Jurisdictional Statement

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81-1862

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-1862

Howard Williams and Shirley Jo Williams
Appellants,

V.

James L. Smith and Patricia A. (J.) Smith
Appellees,

APPEAL FROM WOOD COUNTY COURT OF APPEALS JURISDICTIONAL STATEMENT

Howard & Shirley Jo Williams
Appellants Acting Pro Se
15236 Mitchell Road
Bowling Green, Ohio 43402

Martin L. Smith
Counsel of Record
for Appellees
920½ North Main Street
Bowling Green, Ohio 43402

QUESTIONS PRESENTED BY THE APPEAL

1. Whether the Wood County Court of Appeals improperly ignored the written law of the State of Ohio and the United States of America, and permitted a Wood County Common Pleas Court Judge (Donald D. Simmons) to make his own law, thus changing the existing definitive case law, some of which had existed for over 100 years? Were the laws nullified regarding easements for surface and subsurface drainage by Judge Donald D. Simmons' actions?

2. Whether the Wood County Court of Appeals improperly covered-up the bribery which occurred at the May 11, 1981 oral argument, along with the conspiracy and corruption of the Wood County Common Pleas Court under Donald D. Simmons?

LIST OF ALL PARTIES

Parties Plaintiff-Appellee

James L. Smith

Patricia A. (J.) Smith

Parties Defendant-Appellant

Howard Williams

Shirley Jo Williams

TABLE OF CONTENTS AND APPENDICES

	Page
Questions Presented by the Appeal	1
List of All Parties	2
Opinions or Orders Below	3
Grounds of Jurisdiction of Supreme Court	3
Statutory and Constitutional Provisions Involved	4
Statement of the Case	7
Substantiality of Federal Questions	16
Conclusion	17
Certificate of Service	18
Appendices:	
I. A. *Judgment Entry* rendered November 12, 1980 overruled *Motion for New Trial*	A-1
II. A. *Final Judgment Entry* rendered on October 10, 1979; judgment rendered in favor of Plaintiffs after trial	A-3
B. *Decision and Journal Entry* of the Wood County Court of Appeals rendered April 11, 1980 in Case No. WD-79-52	A-6
C. *Decision and Journal Entry* of the Wood County Court of Appeals filed May 7, 1981	A-10
D. Transcript of May 11, 1981 Oral Argument in the Wood County Court of Appeals	A-11
E. The Daily Sentinel-Tribune newspaper article citing "baked goods"	A-19
F. *Decision and Journal Entry* of the Wood County Court of Appeals rendered June 9, 1981 concerning *Motion for Voluntary* Removal	A-20
G. Letter from the Supreme Court of Ohio concerning *Motion for Voluntary Removal*	A-21
H. Letter from the Supreme Court of Ohio *Motion for Disqualification*	A-22

III. A. *Decision and Journal Entry* of the Wood County Court of Appeals rendered June 5, 1981 in Case No. WD-80-81 ..... A-23

B. *Order* of the Supreme Court of Ohio -- denying rehearing A-24

C. *Order* of the Supreme Court of Ohio -- overruling Motion to Certify Record A-25

D. *Order* of the Supreme Court of Ohio -- dismissing *Appeal as a Matter of Right* A-26

IV. A. *Notice of Appeal* to the Supreme Court of the United States A-27

V. A. Baker v. Rice, 56 Ohio St 463 ..... A-29

B. Map showing disputed property and drainage systems A-45

C. Pertinent Photographic Evidence Presented at the trial of Case No. 78-CIV-340 ..... A-46

TABLE OF AUTHORITIES

Page

Ohio Jurisprudence

18A OJur 2d, Easements, §28, Easements Implied From Existing Use on Severance of Title, (1) In General, Generally 4, 8

American Jurisprudence

25 Am Jur 2d, Easements and Licenses, §27, On Severance of Property, (1) Easements Implied from Pre-Existing Uses, Generally 4, 8

United States Constitution

Fifth Amendment 5, 15

Fourteenth Amendment 6, 16

United States Code

28 U.S.C. §1257 ..... 3, 17

42 U.S.C. §1985(2) 5, 14

Case Law

Baker v. Rice, 56 Ohio St 463 ..... 4, 8

Cohen v. California (1971) 403 US 15, 29 L Ed 2d 284 ..... 3, 17

Cuyahoga River Power Co. v. Northern Realty Co. (1917) 244 US 300, 61 L Ed 1153 ..... 3, 17

Miscellaneous

Civil Liberties Under the Constitution, by: M. Glenn Abernathy 5, 14

Federal Civil Rights Acts, Civil Practice, by: Chester J. Antieau 14

New Webster's Dictionary (College Edition) 11

Pursuant to Rules 12(1), 12(3), and 15 of the Rules of the Supreme Court of the United States, appellants Howard and Shirley Jo Williams, file this statement of the bases upon which it is contended that the Supreme Court of the United States has jurisdiction to review the *Decision and Journal Entry* of the Wood County Court of Appeals in this case, and should exercise such jurisdiction herein.

OPINIONS OR ORDERS BELOW

The *Decision and Journal Entry* of the Wood County Court of Appeals concerning this case is unreported and unpublished. It is included herein as Appendix III-A and may be found on page A-23.

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from a motion to vacate the judgment and reopen Wood County Common Pleas Court Case No. 78-CIV-340, and declare that a new trial be had. The *Decision and Journal Entry* of the Wood County Court of Appeals was filed of record on June 8, 1981. A timely notice of appeal was filed and appeal pursued to the Supreme Court of Ohio. The *Orders* of the Supreme Court of Ohio overruling the *Motion to Certify the Record,* the *Appeal as of Right,* and rehearing on the above were entered on November 25, 1981, and December 23, 1981, respectively. A timely *Notice of Appeal* was filed with the Wood County Court of Appeals on March 10, 1982.

The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1257, providing for the United States Supreme Court review of state court decisions. The cases which support jurisdiction of the Court include:

1. Cuyahoga River Power Co. v. Northern Realty Co. (1917) 244 US 300, 61 L Ed 1153, 37 S Ct 643
2. Cohen v. California (1971) 403 US 15, 29 L Ed 2d 284, 91 S Ct 1780, reh den 404 US 876, 30 L Ed 2d 124

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

18A OJur 2d, Easements, §28, Easements Implied from Existing Use on Severance of Title, (1) In General, Generally:

> Where an owner of land makes an apparent, permanent, and necessary use of one part of his land is favor of another part, and transfers one such part to another person or both parts to different persons, the grant or reservation of an easement to continue such existing use will be implied.57 The easement may be implied in favor of either the grantor or grantee according to the character or nature of the use to be implied.58 Such an implied easement is based upon the theory that without it the grantor or grantee, as the case may be, cannot make use of his land, and that whenever one conveys property he includes in the conveyance whatever is necessary for its beneficial use and enjoyment and retains whatever is necessary for the use and enjoyment of the land retained.59 The easement is to be enjoyed as it existed at the time of the conveyance of the land.60

Baker v. Rice, 56 Ohio St 463 (headnotes included herein; case located in Appendix V-A, pp. A-29)

> Where one who is the owner of a body of land, during his occupancy of it, constructs a private way over one part of it to another as a means of egress and ingress to the latter from his home and also to the public highway, which way is apparent, continually used, and reasonably necessary to the use and enjoyment of the land to which the way is constructed, and, also, adds materially to its value, conveys by deeds of the same date, the part with the way to it to one of his children and the part with the way over it to another one of them each takes his

part to be enjoyed with reference to the way as the same existed at the time of the division--the one with an implied grant of the way to it, and the other subject to such way as an easement therein.

25 Am Jur 2d, Easements and Licenses, §27, On Severance of Property, (1) Easements Implied From Pre-Existing Uses, Generally

Where, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another part, which servitude is in use at the time of severance and is necessary for the reasonable enjoyment of the other part, on a severance of the ownership a grant of the right to continue such use arises by implication of law.4 Similarly, where the owner of property, one part of which has been subjected to such a use for the benefit of another part, sells both parts to different purchasers, the respective portions granted are subject to or benefited by, as the case may be, an easement corresponding to such use.5

Fifth Amendment to the United States Constitution

nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;

Civil Liberties Under the Constitution, M. Glenn Abernathy, pp. 157

While it is sometimes suggested that the purpose of the privilege was simply to prevent torture, there is another reason as well. It lies in the general feeling that the concept of fair play demands that the individual not be required to accuse and convict himself out of his own mouth. The case against him must be built by the government without requiring of the accused that he make their case for them by his own testimony. This aspect of the privilege has

important consequences. It is not confined, for example, merely to cases of criminal prosecution, but extends to all sorts of proceedings where testimony might be required and where the divulgences might lead to a later criminal prosecution of the witness. Thus the privilege can operate in civil cases and in legislative investigations, as well as in a criminal prosecution...."

Fourteenth Amendment to the United States Constitution (Section 1)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42, United States Code, §1985(2)

or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws.

STATEMENT OF THE CASE

Howard and Shirley Jo Williams, defendant-appellants herein, have farmed a parcel of ground for over 30 years. This parcel was originally an 80-acre tract owned by Shirley Jo Williams' parents, Clark M. and Hazel I. Young. In 1963, Mr. & Mrs. Young deeded 72.5 acres of this 80-acre parcel to their daughter. They retained the northerly frontage of approximately 7 acres. The depth of this frontage was 250' from the adjacent roadway. (A map of this parcel is included as Appendix V-B, pp. A-45). Upon the death of Hazel I. Young in 1972, this frontage passed to Clark M. Young alone. In 1976 and 1977, Clark M. Young sold portions of this northerly frontage to James L. and Patricia A. (J.) Smith. Ironically, the sections which were sold contained easements dating back to the 1963 split. The use and necessity of the easements is demonstrated by the photographs located in Appendix V-C, pp. A-46.

The disputed 80-acre parcel is located adjacent to the western boundary of Bowling Green, Ohio. That city is located in Northwestern Ohio. Proper water drainage is essential to agriculture in Northwestern Ohio. The defendant-appellants assert that they have easements for water drainage. Ohio and United States law support their position. During the summer of 1978, James L. Smith authorized the obstruction of the easements. When Howard Williams removed the obstructions from the easements in the fall of 1978, James L. and Patricia A. (J.) Smith filed suit in the Wood County Common Pleas Court. They are the plaintiff-appellees herein, and the case was filed as Case No. 78-CIV-340.

The *Final Judgment Entry* of Case No. 78-CIV-340 ignored the written laws concerning easements. (It is included herein as Appendix II-A, pp. A-3). Judge Donald D. Simmons concurred with the jury verdict and found the defendant-appellants guilty of civil trespass.

The unsuccessful appeal of Case No. 78-CIV-340 did not contain the easement issues. Subsequently, the defendant-appellants, acting pro se, filed a *Motion for a New Trial.* This *Motion* contained the easement issues plus other material allegations.

The federal question concerning easements was raised in the trial court by quoting 18A OJur 2d, Easements, §28, Easements Implied From Existing Use on Severance of Title, (1) In General, Generally, in the *Motion for a New Trial* filed on November 7, 1980. It was presumed by the defendant-appellants that the trial court would check the quotations listed in that *Motion* before rendering a *Judgment Entry.* It was for this reason that the footnotes to the citations were not included in the *Motion.* If footnotes had been included in that *Motion,* then the same cases which appear in *American Jurisprudence* would have occurred therein. A case in point is that of *Baker v. Rice,* 56 Ohio St 463. This case is cited in both 18A OJur 2d, Easements, §28, and 25 Am Jur 2d, Easements and Licenses, §27. The *Judgment Entry* concerning the *Motion for a New Trial* was prepared on November 12, 1980. (This *Judgment Entry* is included as Appendix I-A, pp. A-1). The *Judgment Entry* did not address the issue of easements. Instead, the Court chose to ignore the issue, thus putting the written easement law in question.

18A OJur 2d, Easements, §28, Easements Implied from Existing Use on Severance of Title, (1) In General, Generally, was also citied in the *Brief of Defendant-Appellants* filed on January 12, 1981 in the Wood County Court of Appeals. Again, no footnotes were included. The defendant-appellants presumed that the court could refer to the source of the quotations. The *Decision and Journal Entry,* filed in the Appellate Court on June 8, 1981, also refused to discuss the issue of easement law. (This *Decision and Journal Entry* can be located in Appendix III-A, pp. A-23). The Appellate

Court also found a convenient excuse for denying the defendant-appellants a new trial. The Appellate Court refused to acknowledge the existence of the easement law; much less the enforcement of it. The federal question concerning easements have been raised twice, and ignored by the state courts.

It has been the position of the defendant-appellants that a trial court judge does not have the authority or the jurisdiction to invalidate the laws on the books. This position was illustrated on page 3 of the *Motion for a New Trial* filed on November 7, 1980 in the trial court. This position was also ignored in the *Judgment Entry* of the trial court. It was reiterated in the *Brief of Defendant-Appellants.* Again, it was ignored in the *Decision and Journal Entry* of the Appellate Court. The Courts do not have the authority to make law, but the Ohio courts simply refuse to recognize that fact.

Rule 18(C) of the *Rules of Appellate Procedure* specifies that an appellee is to timely file a brief. The plaintiff-appellees' attorney, Martin L. Smith, failed to file the required brief. The penalty for this omission is not to be heard at oral argument. Martin L. Smith filed a *Motion to Dismiss Appeal* on February 2, 1981 instead of the required brief. The defendant-appellants asserted this violation of the rules in their reply brief, filed on February 18, 1981. A *Memorandum Concerning Oral Argument* was also filed by the defendant-appellants concerning the plaintiff-appellees' violation of the rules and why he should not be heard at oral argument. The plaintiff-appellees then filed a *Motion* to be heard at oral argument. The *Decision and Journal Entry,* filed on May 7, 1981, denied the plaintiff-appellees the right to be heard on the merits of the case at oral argument. It did, however, give the plaintiff-appellees the right to oral argument on the *Motion to Dismiss Appeal.* The ending to this decision stated that the appellants were allowed to respond to the *Motion to Dismiss Appeal,*

and then proceed with their oral argument on the assignments of error. (This *Decision and Journal Entry* is included as Appendix II-C, pp. A-10).

The Wood County Court of Appeals' Oral Argument for this case was held on May 11, 1981. The course of the oral argument did not conform to that Court's rules or *Decision and Journal Entries.* Rule 21(C) of the *Rules of Appellate Procedure* specifies that the appellant is to open the argument as well as to give a fair statement of the case. The oral argument began with the plaintiff-appellees' argument in favor of the *Motion to Dismiss Appeal.* The only "fair statement of the case" was given by Martin L. Smith for the plaintiff-appellees, not the defendant-appellants. The Decision and Journal Entry, filed on May 7, 1981, gave the appellants the right to respond to the *Motion to Dismiss Appeal,* as well as give their own argument on the merits of the case. The oral argument was not conducted in that manner. Instead, the argument against the *Motion to Dismiss Appeal* and the argument on the merits became entangled and disordered.

Shirley Jo Williams was the spokesperson for the defendant-appellants. The *Brief of Defendant-Appellants* contained the merits of the case on appeal. During the oral argument, Shirley Jo Williams was not allowed to discuss the merits of the case. She was not allowed to give the speech which she had so diligently prepared. She was not allowed to use this prepared speech as notes. Instead, Judge Frank W. Wiley led her into a question and answer session. This oral argument finalized into an impromptu speech on Constitutional Law. The defendant-appellants taped the oral argument. A transcript of this tape is included as Appendix II-D, pp. A-11.

The May 11, 1981 oral argument was conducted as a cover-up of the issues involved. *New Webster's Dictionary* (College Edition) defines cover-up as follows:

> "Whatever is done to conceal wrongdoing, esp. a distraction so that there will not be an investigation."

This oral argument was not conducted according to the *Rules of Appellate Procedure,* or according to that Court's *Decision and Journal Entry.* Instead, it was conducted in a very confusing manner, and the merits of the appeal were never discussed. The reasons for this cover-up are further discussed below.

Bribery had occurred at the May 11, 1981 oral argument! On May 28, 1981, two weeks after the oral argument, the local newspaper, *The Daily Sentinel Tribune,* ran the article titled "Simmons Issues Court Order for $5.92 Payment for Baked Goods." (This article is included as Appendix II-E, pp A-19). In response to this disturbing article, the defendant-appellants filed a *Motion for Voluntary Removal of Appellate Judges on the Grounds of Undue Influence by an Interested Party* on June 1, 1981. The newspaper article was included in this motion as Exhibit A. Meanwhile, on June 5, 1981, this Appellate Court proceeded to render a *Decision and Journal Entry* on the plaintiff-appellees' *Motion to Dismiss Appeal* and defendant-appellants' *Brief.* It was not until June 9, 1981 that the Appellate Court entered a *Decision and Journal Entry* deciding to send the *Motion for Voluntary Removal* to the Ohio Supreme Court in Columbus for determination. That is 4 days after the decision was reached concerning the case! (For this *Decision and Journal Entry* please refer to Appendix II-F, pp. A-20). The Supreme Court of Ohio returned an unsigned letter from Frank D. Celebrezze (Chief Justice) stating that this *Motion* did not fit the requirements of Article IV, Section 5(C) of the Ohio Constitution. (For this letter please refer to Appendix II-G, pp. A-21). The defendant-appellants proceeded to file a *Motion for Disqualification* and a *Memorandum in Support of Motion for Disqualifica-*

tion on June 23, 1981. It was not until July 13, 1981 that the unsigned letter from Frank D. Celebrezze, Chief Justice of the Ohio Supreme Court, was written. This time it was decided that the *Motion for Disqualification* was moot since the Court of Appeals had already decided the case. (For this letter please refer to Appendix II-H, pp. A-22). Bribery and cover-up are running rampant in the Ohio state courts, and the Supreme Court of Ohio is not willing to censure the participants. The defendant-appellants have since learned that the Chief Justice of the Supreme Court of Ohio, Frank D. Celebrezze, is running for governor of Ohio. Since his political support comes from the judiciary, it would be profitable for him to cover-up corruption and conspiracy in that branch of the Ohio government.

The defendant-appellant pursued this appeal to the Supreme Court of Ohio by filing a *Memorandum in Support of Jurisdiction* on August 5, 1981. The plaintiff-appellees again responded by filing a *Plaintiff-Appellees' Motion to Dismiss,* rather than the required *Memorandum in Opposition in Jurisdiction.* An *Entry* filed in the Supreme Court of Ohio revealed that this *Motion to Dismiss* was denied and that the plaintiff-appellees were ordered to submit the required *Memorandum in Opposition to Jurisdiction.* The defendant-appellants' *Memorandum in Support of Jurisdiction* was well as the plaintiff-appellees *Memorandum Opposing Jurisdiction* cited the bribery of the Appellate judges.

The bribery of the Wood County Court of Appeals judges was also discussed in the *Defendant-Appellants' Motion for Reconsideration and Rehearing,* filed on December 4, 1981. Apparently it is the position of the Supreme Court of Ohio that bribery of judges is not an important topic for consideration. It must also be the position of the Supreme Court of Ohio that the cover-up of judges' wrongdoings is an appropriate activity;

and that if they ignore the citizens' complaints, the status quo will be maintained.

At this point one may wonder why the appeals judges would need bribed, and why Judge Donald D. Simmons would be the person involved? The answer is very simple. Judge Donald D. Simmons' court is full of corruption and conspiracy. This bribe was intended to cover-up those misdeeds in office. If the Williams' were allowed to open-up Case No. 78-CIV-340, and expose the corruption and conspiracy, then other people who have had the misfortune to come into Simmons' Court would want to do the same thing. Judge Donald D. Simmons has only been in office since January, 1977, and he has already been sued 5 times. One of those cases was also heard at the May 11, 1981 oral argument. The Ohio courts are afraid that if Case No. 78-CIV-340 were opened up that the corruption would be exposed and cleaned up. Then, where would Judge Donald D. Simmons and his cohorts be?

The evidence supporting collusion, conspiracy, and corruption in Judge Donald D. Simmons' Court concerning Case No. 78-CIV-340 is great. Some of the most outstanding examples of this improper and illegal behavior are as follows:

1. Shirley Jo Williams testified as a plaintiffs' witness, but not as a witness for her own case, thus incriminating herself and her case.

2. The defendant-appellants' daughter, Diane Lynn Williams, owns property adjacent to her mother's property. This property utilizes the same surface and subsurface drainage which was the subject of Case No. 78-CIV-340. Diane Lynn Williams was not a party to that case. Instead, she was "locked out" of the courtroom during the trial. This is a gross violation of her United States Constitutional Rights of due process of law and equal protection of the laws.

3. The composition of the jury was not impartial.

4. Time became very important after the beginning of the defendants' case. Many subliminal references to time and "let's hurry up" were introduced into the defendants' case, by the judge.

5. The jury was prejudiced by the judge's actions, as well as by the slanderous attacks by the plaintiffs, and their attorney, Martin L. Smith.

6. Irrelevant and immaterial evidence presented by the plaintiffs ruined Shirley Jo Williams' reputation.

7. Martin L. Smith, plaintiffs' counsel, used perjured testimony.

8. John S. Cheetwood, defendants' counsel, did not prepare an adequate case to take to trial.

9. John S. Cheetwood, although well-educated and experienced, did everything wrong once in the courtroom. A Duke University graduate could not present a simple multiplication problem to the jury.

10. John S. Cheetwood, defense counsel; Rex Huffman, defense counsel; and Martin L. Smith, plaintiffs' counsel, were all connected with the Wood County Prosecuting Attorneys' Office.

This list has been limited to these ten items for the sake of brevity; although many more could have been elicited.

The federal questions concerning this corruption and conspiracy were raised at the trial court level in the *Motion for a New Trial* filed by the defendant-appellants on November 7, 1980. The federal questions raised included the Fifth Amendment to the United States Constitution, as well as the federal protection against conspiracy as cited in 42 U.S.C.S. §1985(2). 42 U.S.C.S. §1985(2) was cited in that *Motion* by quoting a portion of *Federal Civil Rights Acts, Civil Practice* written by Chester J. Antieau. The application of the Fifth Amendment privilege against self-incrimination in a civil case was discussed through quoting *Civil Liber-*

ties Under the Constitution by M. Glenn Abernathy. A portion of the Fifth Amendment itself was also quoted in the *Motion for a New Trial.* The *Judgment Entry* of the trial court concerning the new trial motion ignored these federal questions.

The federal questions of the Fifth Amendment to the United States Constitution and 42 U.S.C.S. §1985(2) were preserved on appeal by their inclusion in the *Brief of Defendant-Appellants.* Again, these issues were ignored by the Appellate Court in their *Decision and Journal Entry,* dated June 5, 1981. The violations of Constitutional due process of law was also discussed in the *Motion for a New Trial* and the *Brief of Defendant-Appellants,* but did not cite specific constitutional provisions.

When the defendant-appellants, acting pro se, prepared the *Motion for a New Trial,* their main concern was the restoration of surface and subsurface drainage to their farm. During the Summer of 1981, many Northwest Ohio farmers lost crops due to flooding, so drainage is an important concern of this occupation. During the preparation of the *Motion for a New Trial,* the defendant-appellants only had strong suspicions of collusion and conspiracy, with some obvious blunders by the attorneys involved, to support their beliefs. One of the bases of this *New Trial Motion* was the discovery of evidence under Ohio Civil Rule 60(B). The defendant-appellants were considering a Detailed Topographical Survey Map to support the drainage issues would fit this description. Since that time, however, new evidence has come into the possession of the defendant-appellants. This new evidence supports the collusion theory, and the improper involvement of the Wood County Prosecuting Attorneys' Office in Case No. 78-CIV-340.

Wood County Common Pleas Court Case No. 78-CIV-340 is the case upon which several other lawsuits

are based. This collusion, conspiracy, and corruption has spread from the RIGGING of one civil case (Case No. 78-CIV-340), to the use of that fraudulent *Judgment Entry* in two civil cases and one criminal case. Since this conspiracy was cited in the *Motion for a New Trial,* filed on November 7, 1980, and has been carried through each succeeding court to this one, it is the strongest federal question upon which to base this appeal. If the citizens of Ohio, particularly Wood County, Ohio, do not have the equal protection of the laws through the courts, what alternative actions are open to said citizens?

SUBSTANTIALITY OF FEDERAL QUESTIONS

This appeal presents important and substantial questions, as hereinafter described, in that the Ohio state courts have ignored the written laws concerning easements, thus depriving the defendant-appellants the equal protection of the laws; the Wood County Court of Appeals was bribed by the Wood County Common Pleas Court judge whose decision they were to review; the Wood County Court of Appeals and the Supreme Court of Ohio are covering-up the corruption and conspiracy in the Wood County Common Pleas Court to deprive the defendant-appellants of their property rights, equal protection of the laws, and due process of law; and that the Wood County Court of Appeals would rather "bury" the issues involved than bring them forward by way of a new trial.

The corruption appears to be so rampant in the Ohio state court system that this Court's intervention is necessary to enforce the laws of the State of Ohio and the United States of America, and to provide the defendant-appellants with due process of law and equal protection of the laws. The citizens expect the courts to be HONEST, and settle disputes between parties using the written law as guidelines. Ohio courts do not fit this

description. For these reasons it is imperative that the United States Supreme Court review this case.

The statute cited in support of jurisdiction in this Court is Title 28, United States Code, Section 1257. The cases supporting this jurisdiction are Cuyahoga River Power Co. v. Northern Realty Co. (1917) 244 US 300 and Cohen v. California (1971) 403 US 15. These cases were cited in support of the Wood County Court of Appeals being the highest state court in which review could be had. The Supreme Court of Ohio has refused jurisdiction in this case, thereby making the Appellate Court decision the final appealable order.

CONCLUSION

For the reasons stated above, defendant-appellants submit that this appeal brings before the Court substantial federal questions and federal constitutional issues which require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Dated March 23, 1982.

The defendant-appellants, acting pro se, hereby certify that they have prepared the foregoing *Jurisdictional Statement* on this 23rd day of March 1982, and that all statements are true and accurate to the best of their knowledge. This document is very respectfully submitted to the United States Supreme Court for its consideration.

Howard Williams
15236 Mitchell Road
Bowling Green, Ohio 43402

Shirley Jo Williams
15236 Mitchell Road
Bowling Green, Ohio 43402

CERTIFICATE OF SERVICE

I, Shirley Jo Williams, appellant herein, acting pro se, hereby certifies that on March 23, 1982, pursuant to Rule 28(3), Rules of the Supreme Court, I served 3 copies of the foregoing *Jurisdictional Statement* on each of the parties herein as follows:

On James L. Smith and Patricia A. (J.) Smith, appellees herein, by depositing such copies in the United States Post Office, Bowling Green, Ohio, with first class postage prepaid, certified mail, return receipt requested, properly addressed to the post office address of Martin L. Smith, the above named appellees' counsel of record at 920½ North Main Street, Bowling Green, Ohio 43402.

All parties required to be served have been served.

Dated March 23, 1982.

Shirley Jo Williams

Appendix

Appendix I-A

IN THE COURT OF COMMON PLEAS OF WOOD COUNTY, OHIO

James L. Smith, et al.,	*	Case No. 78 CIV-340
Plaintiff,	*	
vs.	*	JUDGMENT ENTRY
Howard Williams, et al.,	*	
Defendant.	*	

This case came on before the Court on defendants' "Notice Of Appearance" and "Motion For A New Trial" both filed November 7, 1980. The apparent basis for defendants' motion, as stated therein, is "There are several instances in which it appears that the jury verdict and the court's decision conflict with the Ohio Revised Code and Ohio Jurisprudence." The Court, having fully considered the pleadings and the applicable law, finds defendants' motion not well-taken and the same is hereby overruled.

On October 10, 1979 a Final Judgment Entry was placed of record reflecting the jury verdict of October 1, 1979 in favor of plaintiffs'. Thereafter, on October 15, 1979, defendants' filed a "Motion" for relief from judgment, a new trial, judgment notwithstanding verdict, and a remittiter. This motion was overruled in its entirety by Judgment Entry placed of record October 30, 1979. On November 29, 1979 defendants filed a "Notice of Appeal." The Sixth District Court of Appeals, upon review of this case, affirmed in all respects the jury verdict. Defendants' Motion To Certify The Record Of The Court Of Appeals, to the Ohio Supreme Court was overruled on September 12, 1980.

In passing upon defendants' motion for new trial the Court is guided by Rule 59 (B) of the Ohio Rules of Civil Procedure which states:

> "(B) A motion for new trial shall be served not later than fourteen days after the entry of the judgment."

Clearly defendants' motion is out of rule at this late date. It is therefore ORDERED, ADJUDGED, and DECREED that defendants' motion for a new trial filed November 7, 1980 is overruled, at defendants' costs.

A copy of this Judgment Entry is being sent to counsel for plaintiff and to defendants personally by the Clerk of this court. mailed 11/13/80

November 12, 1980
Date

Judge

Appendix II-A

IN THE COMMON PLEAS COURT OF WOOD COUNTY, OHIO

James L. Smith et al.,

Plaintiffs,

vs.

Howard Williams et al.,

Defendants.

Case No. 78-CIV-240

FINAL JUDGMENT ENTRY

This cause came on for hearing October 1, 1979 before the Honorable Donald D. Simmons, Judge, and a jury consisting of the following persons: Chester Kadas, Linda Whitney, Ralph Francisco, Lloyd Culbertson, Claudette Davis, Yvonne Mower, Joann Jeffers Tonjes, Linda Myers and Alternate Juror Jane Cooley.

Present in Court were the parties, with the plaintiffs being represented by Attorney Martin Smith and the defendants being represented by Attorney John S. Cheetwood and Attorney Rex Huffman.

Prior to trial the following Exhibits were marked for purposes of identification: Plaintiffs' Exhibit 1, through 5 and Defendants' Exhibits A-1 through N-2. Motion for separation of witnesses was concurred in by both plaintiffs and defendants and the same was granted.

The jury heard the opening statements of counsel, after which they were conveyed for the jury view, a motion having been made for a view by the plaintiffs and granted by the Court. Thereupon, the jury view having been concluded, the jury heard testimony from the following witnesses: James Smith, Patricia Smith, Shirley Jo Williams as upon cross examination, Mark Bushman,

and Bill Hofner. Plaintiffs moved for the admission of Plaintiffs' Exhibits 1 through 5 and Plaintiffs' Exhibit 1 was admitted over the objection of defense counsel, while Plaintiffs' Exhibits 2 through 5 were admitted without objection. Plaintiffs thereupon rested.

Thereupon defendants moved for a directed verdict, and following the arguments of counsel, the Court withheld ruling on whether or not the plaintiffs had proved trespass on the part of Shirley Jo Williams or Howard Williams and found that maximum damages in the amount of $1,000 had been presented to the jury. The Court found that malice had not been proved on the plaintiffs' case in chief and granted a directed verdict on that issue. The Court further ruled that right to possession of the property had been admitted by defendants.

Thereupon defendants presented evidence through the following witnesses: Gene Nagle and Diane Williams, after which the Court adjourned at 4:25 P.M. for the day, at the conclusion of the direct examination of Diane Williams.

Court readjourned on October 2 , 1979 and the defendants presented further evidence through the following witnesses: Conclusion of the testimony of Diane Williams, Howard Williams, Liz Bivins and John Heyman. Defendants moved for the admission of Defendants' Exhibits A-1 through A-4, Defendants' Exhibits C through H-5, Defendants' Exhibits M-3 and N-1 through N-2. Defendants' Exhibits B-1 through B-3, I-1 through I-6, J, K, L, M-1 and M-2 were withdrawn by counsel for the defendants. There being no objection, Defendants' Exhibits C through H-5 were admitted, Defendants' Exhibits M-3, N-1 and N-2 were admitted, and over the objection of plaintiffs, Defendants' Exhibits A-1 and A-2 were admitted. Defendants' Exhibits A-3 and A-4 were rejected.

Thereupon defendants rested and plaintiffs moved for directed verdict on the defendants' counterclaim. Following arguments, the Court granted a directed verdict in favor of the plaintiffs on the issues of punitive damages, weeds as a nuisance, and trespass concerning the septic tank drain.

Thereupon the plaintiffs presented the following witnesses upon rebuttal: Donald McNeely, Kenneth C. Dean, Jr., during whose testimony Plaintiffs' Exhibit 6 was identified, Pete Gonyer, Doug McKnight.

Thereupon both the plaintiffs and the defendants rested, and plaintiffs moved for the introduction of Plaintiffs' Exhibit 6, which was rejected.

Defendants renewed their motion for directed verdict and the Court held that trespass on the part of Shirley Jo Williams and Howard Williams was a jury question and reaffirmed that money damages to plaintiffs were limited by the evidence to $1,000. Thereupon the Court adjourned.

Court readjourned October 3, 1979, whereupon the jury heard the closing arguments of counsel and the charge of the Court, after which the jury deliberated and returned a verdict on the Plaintiffs' complaint in behalf of plaintiffs in the amount of $1,000 and a verdict on the defendants' counterclaim in favor of plaintiffs.

It is, therefore, ORDERED AND JUDGMENT RENDERED on the Jury Verdict in favor of the plaintiffs, James L. Smith and Patricia Smith and against the defendants Howard Williams and Shirley Jo Williams in the amount of $1,000.00 on the plaintiffs' complaint and in favor of the plaintiffs James L. Smith and Patricia Smith on the defendants' counterclaim. The costs of this action shall be taxed to the Defendants and this cause is hereby concluded.

A copy of this judgment entry to counsel of record.

October 10, 1979
Date

Judge

Appendix II-B

COURT OF APPEALS OF OHIO, SIXTH DISTRICT

COUNTY OF WOOD

C. A. NO. WD-79-52

James L. Smith and Patricia A. Smith

APPELLEES

-VS-

Howard Williams and Shirley Jo Williams

APPELLANTS

APPEAL FROM

WOOD COUNTY COMMON PLEAS COURT

NO. 78-CIV-340

DECISION & JOURNAL ENTRY

FILED
WOOD COUNTY, OHIO
COURT OF APPEALS
APR 11 1980
Clerk

DATE April 11, 1980

This cause came on to be heard upon the record in the trial court. Each assignment of error was reviewed by the court and upon review the following disposition made:

Plaintiffs-appellants initiated this case in the Wood County Court of Common Pleas, alleging that defendants-appellants trespassed on their property. Defendants denied this and filed a counterclaim.

The case proceeded to trial. The defendants moved for a directed verdict after the plaintiffs rested. The trial court limited the issue of plaintiffs' damages to the sum of $1,000 and directed a verdict in favor of defendants on the issue of punitive damages.

The defense then presented its case in chief and the plaintiffs moved for a directed verdict at its conclusion. The court directed a verdict on three of defendants' counterclaims.

1. Judge

The remaining issues were then submitted to the jury which returned a $1,000 verdict for the plaintiffs. The court overruled defendants' motion for judgment notwithstanding the verdict.

Plaintiffs James and Patricia Smith owned property in Bowling Green, Ohio. Defendants Howard and Shirley Williams owned 72.5 acres which was adjacent to the southern portion of the Smiths' land.

In late October of 1978, Howard Williams plowed two furrows from the 72.5 acre parcel across plaintiffs' property from the street. Williams claimed these furrows were for drainage purposes. The Smiths claimed Williams' action constituted a trespass. Defendants argued that they had a legal right to plow furrows over the plaintiffs' property.

The Smiths' septic tank had been discharging sewage onto defendants' property for some time. The Williams claimed that this constituted a trespass.

The defendants have advanced five assignments of error, the first of which is as follows:

> "1. IN A CLAIM FOR DAMAGES FOR INJURY TO REAL PROPERTY, IT WAS ERROR TO DENY DEFENDANTS' MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF PLAINTIFFS' CASE WHERE THE EVIDENCE REVEALED A FAILURE BY PLAINTIFFS TO PRESENT EVIDENCE OF THE REAL PROPERTY'S FAIR MARKET VALUE IMMEDIATELY BEFORE AND IMMEDIATELY AFTER THE ALLEGED INJURY."

It is true that the plaintiffs failed to introduce evidence of the property's fair market value immediately before and immediately after the injury. It is also true that the absence of such evidence is immaterial since the diminution of the property's value was not the proper measure of damages in this case. That would have been the proper measure of damages had the plaintiffs' property been permanently injured, for instance if it had been destroyed. 22 Am. Jur 2d, Damages §§134-135. But since the plaintiffs suffered only a

temporary injury to their property, the cost of repair was the proper measure of damages. Id. The plaintiffs introduced evidence relevant to that standard.

Interestingly, the defendants have not suggested that the trial judge erred in instructing the jury on the damages issue. This can be ascertained by studying the argument they advanced in support of their fourth assignment of error. Their argument begins, "In the present case the Trial Court correctly instructed the jury as to the proper measure of damage for an injury to real property."

The first assignment of error is not well taken.

Defendants' second assignment of error is as follows:

> "2. IN A CLAIM FOR DAMAGES FOR INJURY TO REAL PROPERTY, IT WAS ERROR FOR THE TRIAL COURT TO DENY DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT WHERE THE RECORD REVEALS THAT THERE WAS NO DIFFERENCE IN THE FAIR MARKET VALUE OF PLAINTIFFS' PROPERTY IMMEDIATELY BEFORE AND IMMEDIATELY AFTER THE ALLEGED INJURY."

For the reasons previously expressed, the second assignment of error is not well taken.

Defendants' third assignment of error is as follows:

> "3. IT IS ERROR WHERE THE RECORD REVEALS THAT THE JURY FAILED OR REFUSED TO FOLLOW THE COURT'S INSTRUCTION AS TO THE PROPER MEASURE OF DAMAGES TO BE APPLIED IN THE CASE."

Our review of the record reveals that the jury applied the law as the judge instructed them to do. Accordingly, the third assignment of error is not well taken.

Defendants' fourth assignment of error is as follows:

> "4. IT WAS ERROR FOR THE TRIAL COURT TO GRANT PLAINTIFFS' MOTION FOR DIRECTED VERDICT ON DEFENDANTS' COUNTERCLAIM ALLEGING THAT PLAINTIFFS WERE TRESPASSING ON DEFENDANTS' REAL PROPERTY BY DISCHARGING UNTREATED SEPTIC TANK SEWAGE ONTO DEFENDANTS' REAL ESTATE."

Defendants argue that on the facts presented they were entitled to injunctive relief. The trial court found that they failed to show any evidence of damages. Naturally, without a showing of damages the irreparable harm necessary to invoke injunctive relief cannot exist. The fourth assignment of error is not well taken.

Defendants' fifth assignment of error is as follows:

"5. THE JURY VERDICT DENYING DEFENDANTS' COUNTERCLAIM THAT PLAINTIFFS HAD OBSTRUCTED A NATURAL EASEMENT RIGHT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

The jury's verdict was supported by some competent, credible evidence going to all the essential elements of defendants' counterclaim. Hence, we will not reverse that verdict as being against the manifest weight of the evidence. C. E. Morris Co. v. Foley Construction Co. (1978), 54 Ohio St. 2d 279.

We find that substantial justice has been done and the judgment of the Wood County Court of Common Pleas is affirmed. This matter is remanded to said court for execution of judgment and for costs. Costs assessed against appellants.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See also Supp. R. 4, amended 1/1/80.

Clifford F. Brown, J. _____ JUDGE

John J. Connors, Jr., J. John J Connors, Jr JUDGE

Frank W. Wiley, J. concur. Frank W Wiley JUDGE

Judge Frank W. Wiley, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

4.

Appendix II-C

IN THE COURT OF APPEALS OF WOOD COUNTY

James L. Smith, et al,
APPELLEES

-vs-

Howard Williams, et al,
APPELLANTS

COURT OF APPEALS NO. WD-80-81

TRIAL COURT NO. 78-CIV-340

DECISION AND JOURNAL ENTRY

FILED
WOOD COUNTY, OHIO
COURT OF APPEALS
MAY 7 1981
Betty J. Hess Clerk

DATE MAY 05 1981

Appellees not having filed an answer brief herein, motion to be heard at oral argument on the merits of the case is denied. Appellees will be limited to oral argument on their motion to dismiss, to which appellants may respond. Appellants may then present argument on their assignments of error.

John W. Potter, Presiding Judge

Andy Douglas, Judge

Frank W. Wiley, JJ., Judge

concur.

Judge Frank W. Wiley, Retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

Vol 3 Pg 455

Appendix II-D

Partial Transcript of the Oral Argument of
Case No. WD-80-81 held on May 11, 1981

Judge Wiley: "Wasn't there a Motion for Discovery?"

Martin Smith: "No. The only grounds for a Motion for a New Trial was 'to acertain the truth.' And it is not based, and it is not a Motion for a New Trial based on the grounds of--"

Judge Wiley: "Do we have a record of this new trial . . . did our record of this . . . these records--"

Martin Smith: "I don't know."

Judge Wiley: "I mean in our, in anything you have filed with the Court that would lead to . . . or dispute it."

Martin Smith: "No, Your Honor."

Judge Wiley: "In the records."

Martin Smith: "No, Your Honor."

Judge Douglas: "Without a Motion for a New Trial, because without a Motion to Compel Discovery in the sense that it was not proper procedure . . . he has filed a Motion for a New Trial. Without a Motion for a New Trial, he denied it. So in fact, we are only here on one issue. And that is, did the judge properly deny the Motion for a New Trial. I can't see that it is so difficult."

Martin Smith: "That is correct, Your Honor."

Judge Potter: "You're out of order at this time. We're going to let . . . qualified to argue on the briefs also . . ."

Martin Smith: "Well, my Motion to Dismiss is not--"

Judge Wiley: "A copy of the order of the Appeals trial . . . tried to put back the trays for the purpose of . . . the order appealed from was sought."

Martin Smith: "The order appealed from, Your Honor, was--"

Judge Wiley: "In the Appeals trial--"

Martin Smith: "Was a judgment entry--"

Judge Wiley: "Every time we have to read 10 pages of brief before we find out what they're doing."

Martin Smith: "The order appealed from is the judgment entry which was placed of record on November 13, 1980 overruling the Appellants' Motion for a New Trial. This was filed over a year after--"

Judge Wiley: "Thank You."

Martin Smith: " . . . . . "

Judge Wiley: " . . . . . "

Martin Smith: "My Motion to Dismiss is based upon the tried and true policy that there only should be one review and they have had the opportunity to litigate all of these matters before. We have had a trial on it, we have gone through the Court of Appeals, and the Supreme Court on it, and we have been affirmed in all respects."

Judge Potter: "Is that your argument?"

Martin Smith: "That is my argument."

Judge Potter: "I will ask you to sit down. We will hear from the Williams. I think probably we can combine both your argument on the Motion and your merit argument and I hope you will not exceed 15 minutes together . . . it on this afternoon."

Shirley Williams: "I hope so too, because I have got throat trouble."

Judge Potter: "I'll tell you what we'll do, we'll help you."

Shirley Williams: "I would appreciate it."

Judge Potter: "When your time is up, we'll tell you."

Shirley Williams: "First of all, Your Honor, thank you for seeing us."

Judge Potter: "I should introduce the panel. This is a Court of Appeals for the Sixth District in the County of Wood, and we are all duly elected or assigned. To my left is Judge Andy Douglas who was elected, to my left is Judge Frank Wiley who is retired sitting by assignment, and I'm Judge Potter. We've read everything that has been presented in the way of briefs. We have not been through this record. This recording devise is only for our note taking. It does not make a record. It makes a recording, but not a record in the legal sense. Mr. Whitaker will warn you say at 12 minutes, and then you will have 3 minutes to summarize."

Shirley Williams: "Alright, first of all, Your Honor, thank you for seeing us. We understand that this is a little unusual procedure, but we've had the run-around from the attorneys and the issues are of such grave matters, that honestly we feel that we are the only ones who can really explain what in the world has been going on for about the last 3 years. Now, first of all, and to put it very simply, we want a new trial."

Judge Douglas: " . . . Are you Shirley?"

Shirley Williams: "I am Shirley."

Judge Douglas: "You didn't identify yourself."

Shirley Williams: "Pardon."

Judge Douglas: "You didn't identify yourself."

Shirley Williams: "Oh excuse me, I am Shirley Williams, and my husband is Howard. This is Howard. And this young lady with all of the pictures, this is my daughter, Diane."

Judge Wiley: "Thank You."

Shirley Williams: "Now, to put it very briefly, we need a new trial because from the very beginning the first one got so messed up, jammed up, fuddled up, fooled up, that it was just a complete total waste of time. The real issues never were brought out. And instead of the real issues, it was a smokescreen of nonsense. So, the real issues got shoved off in a corner, and the smokescreen is what went through the courts. And we still have not had many issues. Now listen, WE HAVE A DRAINAGE PROBLEM."

Judge Wiley: "Well, before you get into the drainage problem, we want to hear you on the Motion--"

Shirley Williams: "That is--"

Judge Wiley: "To Dismiss--"

Shirley Williams: "O.K., now--"

Judge Wiley: "And the reason for the Motion to Dismiss."

Shirley Williams: "The reason to Dismiss--"

Judge Wiley: "That you had your day--case was heard by the trial court; it went to the Court of Appeals, and you lost there; and it went to the Supreme Court--"

Shirley Williams: "Well--"

Judge Wiley: "And you got an adverse decision. Now, on what basis can you possibly get into--"

Shirley Williams: "Alright, for--"

Judge Wiley: "Even, even having a new trial considered."

Shirley Williams: "Well, for--"

Judge Wiley: " . . . . . "

Shirley Williams: "Well for--Mr. Smith charges us with being frivolous. A frivolous appeal."

Judge Wiley: "Where?"

Shirley Williams: "That was in his Motion to Dismiss. That was his main issue was that it was a frivolous appeal."

Judge Wiley: "Then there was nothing to appeal. That it was already--had your day in court. And already had your trial. So, there was nothing on which you could really appeal."

Shirley Williams: "Well, let's see."

Judge Wiley: "What was your real reason to appeal for the new trial? The trial court did what that you don't like?"

Shirley Williams: "Well, to begin--"

Judge Wiley: "In this in, in this second round."

Shirley Williams: "In this second round, the Defendant, Shirley Williams, did not have her day in court. That she testified on behalf of the Plaintiffs. She was never testified for her own case. She was not cross-examined by her defense attorney. And if you have checked the papers, which you haven't done, so you haven't seen this segment; she is the only witness that was put in this position. That she was examined on, it says: "as on cross-examination," by Mr. Smith."

Judge Wiley: "Mrs. Williams, ordinarily a Motion--"

Shirley Williams: "I'm talking about me. Do you want this in the third person, or the first person? It doesn't matter."

Judge Potter: "We read your mind, too so--"

Shirley Williams: "I didn't know how formal you wanted to make it."

Judge Wiley: "Ordinarily, when you file a Motion for a New Trial, you set out Grounds for a New Trial."

Shirley Williams: "O.K."

Judge Wiley: "What grounds did you set out, tell us what you approximately considered as grounds for a new trial."

Shirley Williams: "Well, my major ground was that the first trial was a violation of my Constitutional Rights. That there were so many laws violated and so many rules of procedure--"

Judge Wiley: "Now, wasn't, didn't you originally file a Motion for a New Trial in the original case, before you came up here?"

Shirley Williams: "Uh, that was a bunch of the paperwork that went through. But the ISSUES, that's what I'm trying to say: the meat never went through the appeals procedure."

Judge Wiley: "We certainly have went through something up here before. . ."

Shirley Williams: "You have went through a TON of paperwork. And we have went through a ton of paperwork. I've got a three-drawer file cabinet at home full of paperwork--"

Judge Wiley: "I don't quite under---"

Shirley Williams: "And it's ridiculous."

Judge Wiley: "I don't quite understand how you can see this as grounds for a new trial when you already had a new trial motion originally, and it was . . ."

Shirley Williams: "It was defeated for the same reason that the first trial was defeated, for the same reason that Judge Simmons will not allow me a Topographical Map, for the same reason that everything was defeated in the first place."

Judge Wiley: "Well, then you really want to go into, back into the original case and open that up and introduce new evidence."

Shirley Williams: "I can't see any other way that we can straighten out this mess. Right now, gentlemen, they have taken away my drainage away from me."

Judge Wiley: "The reason, the reason why it is somewhat difficult for you to do that now is because you have already had that opportunity to do it in the first round. Now maybe it wasn't done."

Shirley Williams: "It wasn't done, Your Honor."

Judge Wiley: "But you had, but you had the opportunity to do it."

Shirley Williams: "It wasn't done probably because the attorneys didn't work for us. They were working for someone else, they weren't working for us. They were paid by us, but they were not working for me. Mr. Cheetwood never defended me in Court. And Mr. Smith threw a lot of garbage at me; a lot of other incriminating tactics. I testified and incriminated myself, and now that's a violation of my Constitutional Rights. Now, I--maybe you have some other solutions, and we are certainly willing to hear them, if you have got any other way that we can straighten this out; but, from our point of view, and from what law we have read, the only way we can straighten out the issues so that we have the freedom of enterprise and the freedom to earn a living and justice, is to go back and start over."

Judge Wiley: "Quite possibly, quite possibly be from what you've stated that you have not much relief from the officers of the courts in . . . acceptable action because your attorneys didn't do what you wanted and what you could have done and so . . . Let's take the example now of when the case first

Judge Wiley: came up. Let's say that the attorney who didn't notify you of a trial date, and the case would have been dismissed. So you never had, so you never even got it into court. So, the case was dismissed because the lawyer didn't tell you. And you went away and when you came back he said, 'well, I, oh, I should have told you that your case was coming up and you were gone and the judge dismissed the case.' . . . and I can't go back in. Do you understand what I'm saying? The Court probably would then be closed to you because you had your opportunity to go in and you weren't there when you should be. Now, you were there, but you say you didn't come out properly because something the attorney failed to do, properly conducted yourself, you might possibly have some claim with the attorney. You had, you had your day in court as it is called."

Shirley Williams: "Well, what was--"

Judge Wiley: "Although it was unsatisfactory to you. You were there, weren't you?

Shirley Williams: "I was--"

Judge Wiley: "You testified."

Shirley Williams: "I,"

Judge Wiley: "You had a trial."

Shirley Williams: "I was there at a hanging. It was not a Court of Justice and it was not a trial in the sense of the legal word and in the sense of the Constitution of the State of Ohio, and in the sense of the Constitution of the United States. That was not a fair, just trial. Gentlemen, I haven't been through a trial yet."

Judge Douglas: "Was there a jury present on this?"

Shirley Williams: "Yes."

Judge Douglas: ". . . . . alright."

Shirley Williams: "It was a jury."

Judge Douglas: "It was a jury wasn't it? O.K."

Shirley Williams: "It was a jury of 8 people. It was made up of 5 women. So, Mr. Smith takes the first 2 hours and throws garbage at me. 5 women to decide technical drainage topographical issues. 5 middle-aged housewives. So, what does Mr. Smith do, he throws a bunch of character assassination garbage at me."

Judge Douglas: "Now, let's stop right there. What you have--get Mr. Smith out of the picture and day everying you said is true and not true, which ever way you want to do it, your attorneys the

Judge Douglas: same thing, and the judge the same thing, and in the end, 8 people heard all of it, didn't they?"

Shirley Williams: "No."

Judge Douglas: "They didn't? They heard everything that went on in the Courtroom, didn't they?"

Shirley Williams: "They didn't hear the true issues."

Judge Douglas: "But, they heard everything that went on in that trial?"

Shirley Williams: "They heard everything that went on in, they heard--"

Judge Douglas: "In that proceeding."

Shirley Williams: "Yeah, in that proceeding."

Judge Douglas: "Alright, and they ruled against you, didn't they?"

Shirley Williams: "In that proceeding."

Judge Douglas: "Now, what you're here on, is that you're trying to open up that whole thing again and try it with three judges when that has to be done in the lower court. All we are here today is . . . a Motion for a New Trial . . . denied a Motion for a New Trial. We just need to hear whether or not why you think you need a new trial without having all of the evidence. You think that the judge did not use his discretion in not granting you the new trial?"

Shirley Williams: "Yes, I do. I think we need--I think a new trial is in order as the only way to clean up this mess."

Judge Douglas: "I think that sums it up."

Shirley Williams: "I think so too."

Judge Potter: "Does this conclude your argument?"

Shirley Williams: "Would you like to see our pictures? My daughter put an awful lot of work into them.

Judge Potter: ". . . . ."

Shirley Williams: "Pardon."

Judge Potter: "Are those matters in evidence?"

Shirley Williams: "Yes."

Judge Potter: "These pictures are?"

Shirley Williams: "Yes, they are in the evidence that went with the--"

Judge Potter: "Then we'll see them when we review the record."

Shirley Williams: "Would you like me to explain this drainage?"

Judge Potter: "No, I think that we'll be able to understand it."

Shirley Williams: "Howard, is there anything that you would like to add?"

Conclusion of Proceedings unintelligible

Exhibit A

Appendix II-E

THE DAILY SENTINEL-TRIBUNE – BOWLING GREEN, OHIO

Thursday, May 28, 1981

Simmons issues court order for $5.92 payment for baked goods

Wood County's auditor is not particularly happy about being court-ordered to pay for $5.92 worth of baked goods.

The baked goods were furnished to the judges of the Sixth District Court of Appeals when the judges met in Wood County in May.

Harold Bateson received the court order on Tuesday to reimburse Jacqueline Gallagher, an employee of Judge Donald D. Simmons' Common Pleas Court, for baked goods purchased from Peterson's Bakery on May 11.

The appeals judges were meeting in the County Office building that day to hear appeals cases, including Bateson's appeals of previous court orders issued by Simmons.

Bateson said Wednesday he did not think it was ethical that the baked goods were furnished by the common pleas court on the very day that the appeals cases of Bateson vs. Simmons were being heard.

Bateson informed the Wood County commissioners on Wednesday he decided to pay for the baked goods out of his own pocket, rather than use county funds for the reimbursement.

Simmons filed the court order on Friday, asking that Mrs. Gallagher be reimbursed from the common pleas court budget.

Mrs. Gallagher said it was not the first time baked goods had been furnished for the visiting appeals court judges. She also said she thought payment for the baked goods previously provided to visiting judges was made in the same way as Simmons requested on Friday.

Bateson checked the bills sent to him by the common pleas court back through 1980. He could find no other instance of a specific request for payment for baked goods.

But he said such past requests from the court could have been contained under requests to pay other expenses of the court.

Appendix II-F

IN THE COURT OF APPEALS OF WOOD COUNTY

James L. Smith, et al.
APPELLEES

-vs-

Howard Williams, et al.
APPELLANTS

COURT OF APPEALS NO. WD-80-81

TRIAL COURT NO. CV 78-340

DECISION AND
JOURNAL ENTRY

DATE JUN 9 1981

Appellants' motion for "Voluntary Removal of Appellate Judges on the Grounds of Undue Influence by an Interested Party" came on for consideration. This court finds that it is without jurisdiction to rule on said motion. The motion should be filed with the Chief Justice of the Ohio Supreme Court. The clerk of courts is ordered to forward said motion to the Chief Justice of the Ohio Supreme Court pursuant to Article IV, Section 5(C), Ohio Constitution.

The panel, however, asserts that it had no knowledge of who provided the baked goods in question, that they were delivered after the court was in session, and no member of the panel consumed any portion thereof.

Two of the members of the court had a cup of coffee but, scrupulously followed the instructions posted over the coffee pot, to wit: "If you drink it, pay for it." In compliance with the instruction, the members of the panel deposited a sum of money in excess of the reasonable value of the coffee consumed.

FILED
WOOD COUNTY, OHIO
COURT OF APPEALS
JUN 10 1981
Betty J. Hanes Clerk

John W. Potter, J.
Andy Douglas, J.
Frank W. Wiley, J.
concur.

John W. Potter
Presiding Judge

Andy Douglas
Judge

Frank W. Wiley
Judge

Vol 3 Pg. 455

The Supreme Court of Ohio

Columbus

FRANK D. CELEBREZZE
CHIEF JUSTICE

June 12, 1981

Honorable Betty J. Haas
Clerk of Courts
Wood County Courthouse
Bowling Green, Ohio 43402

Re: Case No. C.A. WD-80-81; James L. Smith, et al. v. Howard Williams, et al.

Dear Ms. Haas:

I am herewith returning the "motion for voluntary removal of appellate judges on the grounds of undue influence by an interested party" which was filed in the above-styled cause.

The motion for voluntary removal of judges is not an affidavit of prejudice or motion for disqualification which would be cognizable under Section 5(C), Article IV of the Constitution of the State of Ohio.

Sincerely,

FRANK D. CELEBREZZE
Chief Justice

FDC/jm
Enclosure
cc: Honorable John W. Potter
Mr. Howard A. Williams
Ms. Shirley Jo Williams

Appendix II-H

The Supreme Court of Ohio

Columbus

FRANK D. CELEBREZZE CHIEF JUSTICE
WILLIAM B. BROWN
PAUL W. BROWN
A. WILLIAM BRYANT
RALPH S. LOCHER
ROBERT E. HOLMES
CLIFFORD F. BROWN

FRANK D. CELEBREZZE
CHIEF JUSTICE

July 13, 1981

Honorable Betty J. Haas
Clerk of Courts
Wood County Courthouse
Bowling Green, Ohio 43402

Re: Case No. WD-80-81; James L. Smith, et al. v. Howard Williams, et al.

Dear Ms. Haas:

Inasmuch as the Court of Appeals for Wood County has heard and decided the above-styled cause, the motion for disqualification filed therein against the Court is moot.

It will therefore not be necessary to rule upon the motion and it is being returned herewith.

Sincerely,

FRANK D. CELEBREZZE
Chief Justice

FDC/jm
Enclosure
cc: Honorable John W. Potter
Mr. Howard A. Williams
Ms. Shirley Jo Williams

Exhibit F

IN THE COURT OF APPEALS OF WOOD COUNTY Appendix III-'

James L. Smith, et al.
APPELLEES

-vs-

Howard Williams, et al.
APPELLANTS

COURT OF APPEALS NO. WD-80-81

TRIAL COURT NO. 78-CIV-340

FILED
WOOD COUNTY, OHIO
COURT OF APPEALS
JUN 8 1981
Betty J. Hines Clerk

DECISION AND JOURNAL ENTRY

DATE June 5, 1981

This appeal was heard on appellees' motion to dismiss appeal, for reasonable attorney fees and costs, briefs filed in support and against said motion, and oral argument; and also on appellants' assigments of error and brief, and oral argument. Appellants appeared pro se. Appellees filed no merit brief and were not permitted to participate in oral argument.

The court first considers the motion to dismiss and finds it well taken for the reason that this court passed upon or could have passed upon all issues subject to appeal from the October 10, 1979, trial court judgment in our judgment entry dated April 11, 1980, in case No. WD-79-52.

Motion of appellees to dismiss is granted. Attorney fees for appellees are denied. Appeal is dismissed at appellants' costs and cause remanded to the Wood County Common Pleas Court for execution for costs.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See also Supp. R. 4, amended 1/1/80.

John W. Potter, J.
Judge

Andy Douglas, J.
Judge

Frank W. Wiley, J.
Judge
concur.

Judge Frank W. Wiley, Retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

BARRETT BROTHERS, PUBLISHERS, SPRINGFIELD, OHIO

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 81 *TERM*

To wit: December 23, 1981

James L. Smith et al.,
Appellees,
vs.
Howard Williams et al.,
Appellants.

No. 81-1187

REHEARING

It is ordered by the court that rehearing in this case is denied.

FILED
WOOD COUNTY, OHIO
COURT OF APPEALS
DEC 24 1981

I, THOMAS L. STARTZMAN, of Clerk the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No.....Page.....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 23rd *day of* December *19* 81

THOMAS L. STARTZMAN *Clerk.*

By Dawn J. Tocaimo *Deputy.*

80-121 Baldwin Publishers, Springfield, Ohio

Appendix III-C

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,
City of Columbus.

James L. Smith et al.,

Appellees,

vs.

Howard Williams et al.,

Appellant.

19 81 *TERM*

To wit: November 25, 1981

No. 81-1187

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS

for WOOD *County*

TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

FILED
WOOD COUNTY, OHIO
COURT OF APPEALS
DEC 23 1981

COSTS:

Motion Fee, $20.00, paid by Shirley Jo Williams

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ....day *of* DEC 23 1981 *19*....

THOMAS L. STARTZMAN *Clerk*

Deputy

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 81 TERM

To wit: November 25, 1981

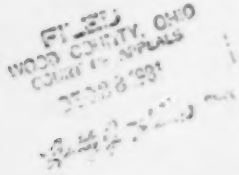
James L. Smith et al.,
Appellees,
vs.
Howard Williams et al.,
Appellants.

No. 81-1187

APPEAL FROM THE COURT OF APPEALS

for WOOD *County*

This cause, here on appeal as of right from the Court of Appeals for WOOD *County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.*



It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for WOOD *County for entry.*

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this DEC 22 1981 *day of* ..... *19* .....

THOMAS L. STARTZMAN *Clerk*

Deputy

Appendix IV-A

IN THE COURT OF APPEALS OF WOOD COUNTY, OHIO

SIXTH APPELLATE DISTRICT

James L. Smith	:	Wood County, Ohio
and	:	Common Pleas Case No. 78-CIV-340
Patricia A. (J.) Smith	:	Sixth District Court of Appeals, Toledo, Ohio Case No. WD-80-81
Plaintiff-Appellees,	:	Ohio Supreme Court Case No.
vs.	:	81-1187
Howard Williams	:	
and	:	
Shirley Jo Williams,	:	
Defendant-Appellants.	:	
	:	

***

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Howard and Shirley Jo Williams, the appellants above-named, hereby appeal to the Supreme Court of the United States from the Decision and Journal Entry of the Wood County Court of Appeals rendered on June 5, 1981 and filed of record on June 8, 1981. The Order of the Supreme Court of Ohio denying rehearing on the Appeal as a Matter of Right and the Motion to Certify the Record was entered on December 23, 1981, and filed in the Wood County Court of Appeals on December 28, 1981.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph (1).

The Defendant-Appellants are pursuing this appeal personally as provided by Title 28, United States Code Section 1654.

Dated March 10, 1982.

Howard Williams
15236 Mitchell Road
Bowling Green, Ohio 43402
telephone: (419) 352-2477

Shirley Jo Williams
15236 Mitchell Road
Bowling Green, Ohio 43402
telephone: (419) 352-2477

PROOF OF SERVICE

I, Shirley Jo Williams, appellant herein, acting pro se, hereby certifies that on March 10, 1982, pursuant to Rule 28 (3), Rules of the Supreme Court, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on each of the parties herein as follows:

On James L. Smith and Patricia A. (J.) Smith, appellees herein, by depositing such copy in the United States Post Office, Bowling Green, Ohio, with first class postage prepaid, certified mail, return receipt requested, properly addressed to the post office address of Martin L. Smith, the above named appellees' counsel of record at 920½ North Main Street, Bowling Green, Ohio 43402.

All parties required to be served have been served.

Dated March 10, 1982.

Shirley Jo Williams
15236 Mitchell Road
Bowling Green, Ohio 43402
telephone: (419) 352-2477

ment, and affirmative relief by way of injunction is unnecessary. The judgment below must be reversed, and cause remanded.

Judgment accordingly.

BAKER *v.* RICE.

Easement—Implied grant.

Where one who is the owner of a body of land, during his occupancy of it, constructs a private way over one part of it to another as a means of egress and ingress to the latter from his home and also to the public highway, which way is apparent, continually used, and reasonably necessary to the use and enjoyment of the land to which the way is constructed, and, also, adds materially to its value, conveys by deeds of the same date, the part with the way to it to one of his children and the part with the way over it to another one of them each takes his part to be enjoyed with reference to the way as the same existed at the time of the division---the one with an implied grant of the way to it, and the other subject to such way as an easement therein.

(Decided June 8, 1897.)

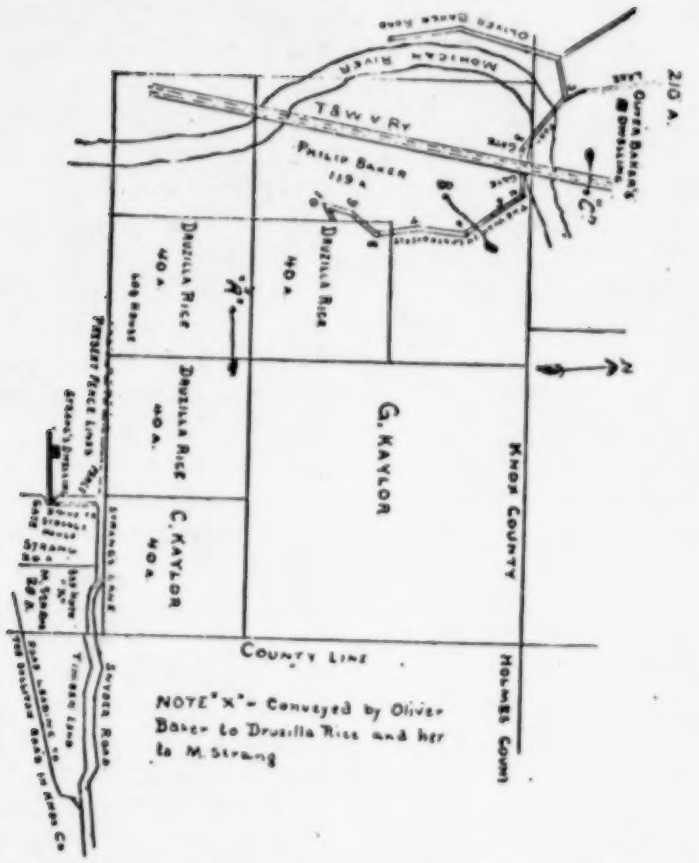
ON ERROR to the Circuit Court of Knox county.

In this case the action below was commenced by the plaintiff, Druzilla Rice, against the defendant, Phillip Baker, to enjoin the latter from obstructing a private way she claimed over his premises to the public highway as incident to her own land. The defendant denied the right of the plaintiff. A temporary injunction was obtained at the commencement of the action, which, at the hearing on the merits, was made perpetual. The cause was appealed to the circuit court, where it was tried with the same result as in the common pleas. On the trial the court made a finding of the facts and its conclusions of law thereon. The findings and conclusions of law are as follows:

First—That on the first day of April, 1867, Oliver Baker, father of the plaintiff and defendant, purchased of one Jacob Young, the one hundred and twenty acres of land described in plaintiff's petition, and also a certain twenty acre tract, designated on the plat hereinafter mentioned as the M. Strang tract; that at the time of said purchase, said Oliver Baker, owned and was in possesson of a tract of land containing about one hundred and nineteen acres, lying immediately west of said one hundred and twenty acre tract, and also owned a tract of land containing about two hundred and ten acres, lying immediately north of said one hundred and nineteen acre tract; that at the time said Oliver Baker purchased said one hundred and twenty acre tract from said Young, he, said Oliver Baker, resided and continued to reside on the said two hundred and ten acre tract until the eighth day of September, 1888, hereinafter mentioned.

The following is a plat showing the relative locations of the three several tracts. The one hundred and twenty acre tract or plaintiff's tract, is shown on the plat by the letter "A." The one hundred and nineteen acre or defendant's tract, is shown on the plat by the letter "B." The two hundred and ten acre tract, by the letter "C."

Second—That immediately after said Oliver Baker purchased said one hundred and twenty acre tract and the said twenty acre tract from said Young, to-wit: During said year of 1867, he, said Oliver Baker, made and constructed a private road or way from where he resided in said two hundred and ten acre tract, in an easterly and south-easterly direction over a portion of said last named tract, and over the said one hundred and



nineteen acre tract to the west line of the said one hundred and twenty acre tract; that said way was enclosed with a gate on the west side of said one hundred and nineteen acre tract; that shortly thereafter and prior to the said 8th day of September, 1888, said Oliver Baker, extended said private way westward to a public highway, known as the Oliver Baker road, which runs in a northerly and southerly direction through said two hundred and ten acre tract, a short distance west of said Oliver Baker's dwelling; that said private way

from the time so constructed, and up to the said 8th day of September, 1888, was used by Oliver Baker in passing to and from said one hundred and twenty acre tract, by foot or team, and generally in all such manner as ways are used, and that said way is plainly obvious and apparent, and is reasonably necessary for the use and enjoyment of plaintiff's lands and adds materially to the value thereof.

Third—That at the time said Oliver Baker purchased said one hundred and twenty acre tract and the said twenty acre tract from said Young, he, said Young, used as a means of egress and ingress from and to said one hundred and twenty acre tract, a certain lane known as the "Strang Lane," which leads from the south-east corner of said one hundred and twenty acre tract, eastward to a public highway known as the "Snyder Road," and that said lane was the only means of outlet said Young had to a public highway from said one hundred and twenty acre tract; that from the time said Oliver Baker purchased said tract from said Young and up to the time he conveyed the same to the plaintiff as hereinafter mentioned, to-wit: Up to the eighth day of September, 1888, the said "Strang Lane," was available to said Oliver Baker, and he did use the same as an outlet to the said public highway from said one hundred and twenty acre tract, without objection from the owner of the soil over which the said lane passed; and that plaintiff from the time said tract was so conveyed to her as aforesaid, has had, and still has the use of said "Strang Lane" as a means of an outlet to the said public highway, if she chooses to so use the same, without objection from the owner of the soil over which said lane

passes, and that said lane is reasonably convenient for travel whether by foot or team, and generally in such manner as ways are used.

Fourth—That on or about the first day of September, 1888, said Oliver Baker had three children, to-wit: The plaintiff, defendant and Nancy Baker, for whom he desired to make provision by conveying said two hundred and ten acre tract, the one hundred and nineteen acre tract, the one hundred and twenty acre tract and the twenty acre tract; that on the first day of September, 1888, the said three children met at the house of the said Oliver Baker, and it was then agreed that said Oliver Baker should convey his homestead, the said two hundred and ten acre tract, to the defendant, Phillip Baker, and that said Phillip Baker should convey back to said Oliver Baker a life estate in the same; that said Oliver Baker should convey to said Nancy Baker, the said one hundred and nineteen acre tract, and also convey the one hundred and twenty acre tract and said other twenty acre tract to plaintiff; and that the said Nancy Baker should convey to the said Phillip Baker, the said one hundred and nineteen acre tract, for the sum of $3,000, to be paid by said Phillip Baker to her; that pursuant to the agreement, thereafter to-wit: On the eighth day of September, 1888, the said Oliver Baker executed his deed for said two hundred and ten acre tract to the defendant, Phillip Baker, with general covenants and warranty and against encumbrances, and he, said Phillip Baker, executed his deed to said Oliver Baker for a life estate in said last named tract; that at the same time said Oliver Baker executed his general warranty deed with covenants against encumbrances to the said Nancy Baker for the

said one hundred and nineteen acre tract, and at the same time she, said Nancy Baker, executed her deed with covenants of general warranty and against encumbrances to the said Phillip Baker for said tract: and he thereupon executed a mortgage deed back to said Nancy Baker, upon said premises, to secure the payment of the said sum of $3,000; that the said Oliver Baker, also executed his deed for said one hundred and twenty acre tract and the said twenty acre tract to the plaintiff, Druzilla Rice.

No mention was made in any of the deeds of the way in controversy; but the granting clause of Oliver Baker's deed to plaintiff contains, after the description, the usual words, "with all the privileges and appurtenances thereto belonging;" that all the parties had full knowledge of the construction and use of said way by said Oliver Baker.

Fifth—That the defendant, to-wit: On the 22nd day of August, 1894, obstructed said way in controversy by locking and securely fastening a gate which stands across said way, at the west side of said one hundred and nineteen acre tract as aforesaid, and that defendant still continues said obstruction.

As its conclusions of law the court finds as follows:

1st. That the way in controversy is not a way of necessity.

2d. That said way is and was at the time of the execution of the deed to plaintiff by Oliver Baker of a continuous character and an appurtenant belonging to the lands of plaintiff; and as such passed by the general words of said deed granting all privileges and appurtenances thereto belong-

ing; and that plaintiff is, by virtue of said deed, the owner of said right-of-way, and is entitled to the use of the same.

3d. That said Nancy Baker took said one hundred and nineteen acre tract subject to plaintiff's right of way over the same.

4th. And for a like reason said Phillip Baker took said two hundred and ten acre tract subject to the right of the plaintiff to said way over the same; and for like reason, said Phillip Baker, took said one hundred and nineteen acre tract, subject to plaintiff's said right-of-way over the same.

5th. That defendant's obstruction is wrongful and unlawful.

ERROR is prosecuted here to reverse the judgment on the ground that the court erred in its conclusions of law.

C. E. Critchfield and *Critchfield & Graham*, for plaintiff in error.

Strictly speaking, a way, even of necessity, does not pass as an appurtenance to the dominant estate. It is in such cases, an implied grant of the *right* of the grantee to pass over the land of the grantor and not a grant of any *particular* way, and this right ceases as soon as the necessity ceases. *Nichols* v. *Luce*, 24 Pick, 102; *Ins. Co.* v. *Wilison*, 1 Barb. Ch., 353; *Bass* v. *Edwards*, 126 Mass., 445.

A man can not have an easement in his own lands. There must be two estates, in regard to which it is predicated, and if the same persons own both, the easement is extinguished. Wash. on Real Prop., Fifth Ed., vol. 2, p. 314.

There are, however, what are called *quasi* easements, "as when the owner of land has constructed a way or drain over a portion of it for the benefit of

another portion and there has never been a separate ownership of a dominant and servient estate." *Parsons* v *Johnson*, 68 N. Y., 66; Gale on Easements, 4th ed., 22; Washburn on Easements, 4th ed., 166; *Fetters* v. *Humphreys*, 19 N. J. Eq., 471; *Fritz* v. *Tompkins*, Supreme Court of New York at Special Term, November 24, 1896, and reported in the New York Supplement of the National Reporter System, page 985; Francis Appeal, 96 Pa. St., 207; *Pearson* v. *Spencer*; 1st. B. & S., 582.

A way of necessity is held to pass by implication, for the reason that the parties are presumed to have intended that the grantee should have possession and use of the thing conveyed so far as necessary to the enjoyment of what was conveyed, although not expressly named in the deed. Goddard on Easements, Fourth Ed., 317.

Does a like presumption arise in respect to a way not of necessity, if forsooth it has long been used, is obvious and apparent and convenient as a means of access to the premises granted? *Pyer* v. *Harter*, 1 Hurl. & N., 916; *Lampham* v. *Miller*, 21 N. Y., 505.

While the decision as applied to the facts in *Pyer* v. *Harter*, has been approved by some courts, the general rule there laid down, is denied both in England and in this county. It was expressly overruled in *White* v. *Bass*, 7 Hurlst & N., 722; and denied in *Suffield* v. *Brown*, 4 De., G. J. & S., 185. And this is now the settled law in England. *Crossly* v. *Lightelowler*, L. R. 2 Ch., 478; *Pearson* v. *Spencer* 3 Best. & S., 761; *Warren* v. *Blake*, 54 Me., 287; *Buss* v. *Dyer*, 125 Mass., 291; *Adams* v. *Marshall*, 138 Mass., 228.

The general rule announced in the case of *Lampham* v. *Milks* (21 N. Y., 505), was limited to the cases of continuous easement and such non-contin-

uous easements as are strictly necessary. *Dodd* v. *Burchill*, 1 H. & C., 113; *Bolton* v. *Bolton*, 11 Ch. Div., 96; *Walley* v. *Thompson*, 1 Bos. & P., 371; *Barlow* v. *Rhodes*, Crompt. & M., 447; *Worthington* v. *Gimpson*, 29 C. J. Q., 116; *Sheysey* v. *Nicery*, 16 M. & W., 484; *Thompson* v. *Waterlow*, Law. Rep., 6 Eq. Cas. 36, and *Langley* v. *Hammon*, Law Rep., 3 Exch., 161.

The American cases are quite as uniform and pronounced against the doctrine of implied grants of ways, other than ways of necessity, Washburn in his work on Real Property, vol. 2, 319, *Nichols* v. *Luce*, 24 Pick., 102; *Carbrey* v. *Willis*, 7 Allen 370; *Ins. Co.* v. *Milnor*, 1 Barb. Ch., 353.

In the present case the court found as conclusions of law that the defendant in error is, by virtue of the deed of Oliver Baker, the *owner* of the way in controversy. *Huttemeier* v. *Albro*, 18 N. Y., 49; *Schrymer* v. *Phelps*, 62 How. Pr., 1; *Serene* v. *Gregory*, 8 Rich., 158; *Trumbull* v. *Rivers*, 3 McCord, 131; *Warren* v. *Blake* 54, Me., 276; *Woosen* v. *Dantel*, 116 Mo., 379; *Field* v. *Mark*, 125 Mo., 502; *Wentworth* v. *Phillpot*, 60 N. H., 193; 69 Me., 323; *Dolliff* v. *N. N. Co.*, 68 Me., 173; *Kingsley* v. *Gouldborough*, 86 Me., 279; *Burns* v. *Gallagher*, 62 Md., 462.

The only case in Ohio directly bearing upon the questions is *Bailey* v. *Copeland*, Wright's Rep. 150. It was there held that in prescribing for a way of necessity, the case must show that the *necessity* for it exists; that such way does not result from necessity when the grantee has means of access to the premises granted other than by the way claimed.

Critchfield & Devin, for defendant in error.

Perhaps no subject known to the law has been productive of so much litigation and so many con-

flicting decisions both in the United States and England as that of easements, but the claims of defendant in error clearly seems to be sustained by the great weight of both American and English authorities. *Morgan* v. *Mason*, 20 Ohio, 401; *Hazzard* v. *Robinson*, 3 Mason, 279; *Elliott* v. *Sallee*, 14 Ohio St., 10; *Meek* v. *Breckenridge*, 29 Ohio St., 642; *Shields* v. *Titus*, 46 Ohio St., 528; *National Exchange Bank* v. *Cunningham*, 46 Ohio St., 575.

In none of the foregoing cases do the court limit the application of the doctrine to "continuous" easements as defined by counsel for plaintiff in error, or in the cases by them cited in support of their claims. In all of those cases continuous easements are said to be those which exist independently of any act of man, such as flowing water, the right to light, air, etc.; while those same authorities class all easements the enjoyment of which necessitates the act of man, as "non-continuous."

In view of the foregoing from our own state it seems unnecessary to multiply authorities, but the following also bear so directly upon the question that we feel justified in bringing them to the intention of the court. *John Hancock Mutual Life Ins. Co.* v. *Patterson*, 103 Ind., 582; *Morrison* v. *King*, 62 Ill., 31; *Cihak* v. *Klekr*, 117 Ill., 643; *Kieffer* v. *Imhoff*, 26 Penn. St., 438; *Phillips* v. *Phillips*, 48 Penn. St., 178; *Penn. R. R. Co.* v. *Jones*, 50 Penn. St., 417; *McCarthy* v. *Kitchenman*, 47 Penn. St., 239; *Cannon* v. *Boyd*, 73 Penn. St., 179; *United States* v. *Appelton et al.*, 1 Sumner, 492; *Jones* v. *Jenkins*, 34 Md., 1; *Payne* v. *Chandler*, 134 N. Y., 385; *Leonard* v. *Leonard*, 7 Allen, 277; *Doukles* v. *Wilton Ry. Co.*, 24 N. H., 481; Tiedman on Real Property, section 842; Boone's Real Property, section 140 *et seq.*; Washburn's Real Property,

5 Ed. vol. 2, sections 10, 16; Washburn's Real Property, 4 Ed. top pages 64 and 65, 70 and 71, 692, 297 and 698; *Bowland* v. *St. John's Schools*, 163 Mass., 236; *Care* v. *Crofts*, 53 Cal., 135; Washburn's Real Property, page 317, section 9, vol. 2. Washburn on Easements, 4th Ed, t. p. 692; Ballards's Ohio Real Property, section 356; Boone's Real Property, section 136 and 306, and many cases there cited. See also Washburn's Real Property, 5th Ed., vol. 3, page 419; Washburn's Easements, 4th Ed., t. p. 697.

The cases most relied upon by counsel for plaintiff in error are those in which it was sought by the grantor to reserve an easement in his favor by implication. Comparatively few of these cases go to the point of holding that an easement for the benefit of the granted premises cannot be the subject of an implied grant. Most of that class of cases cited by opposite counsel make a distinction between an implied grant for the benefit of the grantee and an implied reservation imposing a servitude upon the granted premises in favor of the grantor. Washburn on Easements, 4th Ed., page 110; *Payne* v. *Chandler*, 134 N. Y., 385.

MINSHALL, J. Did the court err in its conclusion of law that the way over the defendant's land passed as an incident to the lands of the plaintiff by the deed of her father? We think it did not.

It is true that at the same time the father conveyed to the plaintiff, he, through his daughter Nancy, conveyed to the defendant the land now owned by him; and if we were to consider this conveyance alone, the way in question would appear as a reservation by the father of a way over the granted lands in opposition to the covenants

of his deed. Whether such a reservation could be made by implication in derogation of the grant and the covenants of the deed need not be considered in this case. Both the plaintiff and the defendants must, from the facts found, be regarded as grantees of the father by deeds taking effect at one and the same time. And, therefore, neither has as against the other any superior right by reason of priority of purchase; and both were volunteers. Oliver Baker was the owner of both tracts and of two hundred and ten acres where he resided at the time of the conveyances. All the lands lay in a body, and had been acquired by him at different times during his life. He purchased the lands deeded the plaintiff in 1867; and, in that year, constructed the way in question from the lands then purchased over the one hundred and nineteen acre tract, to his residence on the two hundred and ten acre tract and shortly afterwards to the public highway. And the court finds, that from that time to 1888, when the division was made, Oliver Baker used the way in passing to and from the lands purchased in 1867, for all the purposes ways are generally used, and that the "way is plainly obvious and apparent, and is reasonably necessary for the use and enjoyment of plaintiff's land and adds materially to the value thereof." In 1888, desiring to divide his heritage between his three children, he conveyed the one hundred and twenty acre tract acquired in 1867, to the plaintiff, the one hundred and nineteen acre tract to his son, the defendant, subject to the payment of $3,000 to his daughter, Nancy, and also the home tract of two hundred and ten acres, reserving a life estate therein to himself. The way in question was then in use over and upon the one hundred

and nineteen acre tract given the defendant, and materially added to the value of the land given the plaintiff.

We think the law well settled in this state, whatever the decisions may be in some of the others, and they are far from being in harmony, that where an estate is divided as was this one, each takes his part subject to or benefitted by such burthens as were openly and plainly attached to or imposed on it by the common owner in his use and enjoyment of the land at the time of the severance, and which on a severance would properly be termed easements or servitudes. Ignoring for the time the distinction between "continuing" and "discontinuing" easements, observed in some of the cases, the case of *Elliott* v. *Sallee* is directly in point. Edward Thompson was the owner of three mills on White Oak creek in Brown county. The lower mill was in part supplied with water by a tunnel constructed across the neck of a bend in the creek, so as to take the water from the creek above the dam of the middle mill, and was thereby, to that extent, servient to the lower mill. By deeds executed at the same time he divided these mills between his three sons, so as to give one of them to each. The plaintiff by purchase became the owner of the middle mill, and brought suit against the defendant, who had purchased the lower mill to recover for the diversion of the water from his mill by the tunnel. The court said: "On this state of facts it seems clear to us on every principle of reason and common sense that he (Edward Thompson) must have intended to grant to his sons respectively, and they must have expected to receive, each his mill with its appurtenances as it actually existed in

fact and in use at the time of the conveyances—no more and no less; and this obvious intention on the part of the grantor, and reasonable expectation on the part of the grantees, furnish the exact measure of the rights of the grantees *inter se*, and of all parties holding under them respectively." The court referred to and approved *Morgan* v. *Mason*, 20 Ohio R., 401. See, also, the case of *Meek* v. *Breckenridge*, 29 Ohio St., 642, where it is said, "A grant of a thing will include whatever the grantor has power to convey which is reasonably necessary to the thing granted;" or, as said by Justice Story in *Hazard* v. *Robinson*, 3 Mason, 279, "Whatever is actually enjoyed with the thing granted as a beneficial privilege at the time of the grant passes as parcel of it." See also, the later case of *Shields* v. *Titus*, 46 Ohio St., 528; and *Bank* v. *Cunningham*, Id. 575. In the latter case it is said, in the syllabus, "When the owner of an estate makes one part of it visibly dependent for the means of access upon another and creates a way for its benefit over another, and then grants the dependent part, the other part becomes subservient thereto, and the way constitutes an easement appurtenant to the estate granted and passes to the grantee as accessorial to the beneficial use and enjoyment of the granted premises." This case is supported in the latitude of its expression by many cases in other states. *Mutual Life Ins. Co.* v. *Patterson*, 103 Ind., 582; *Morrison* v. *King*, 62 Ills., 30; *Cihak* v. *Klekr*, 117 Ills., 643; *Kieffer* v. *Imhoff*, 26 Penna. St., 438; *Phillips* v. *Phillips*, 48 Id., 178; *Railway Co.* v. *Jones*, 50 Id., 417; *McCarty* v. *Kitchenman*, 47 Id., 239; *Cannon* v. *Boyd*, 73 Id., 179; *U. S.* v. *Appleton*, 1 Sum., 492;

Paine v. *Chandler*, 134 N. Y., 385; *Collins* v. *Prentice*, 15 Conn., 39-43.

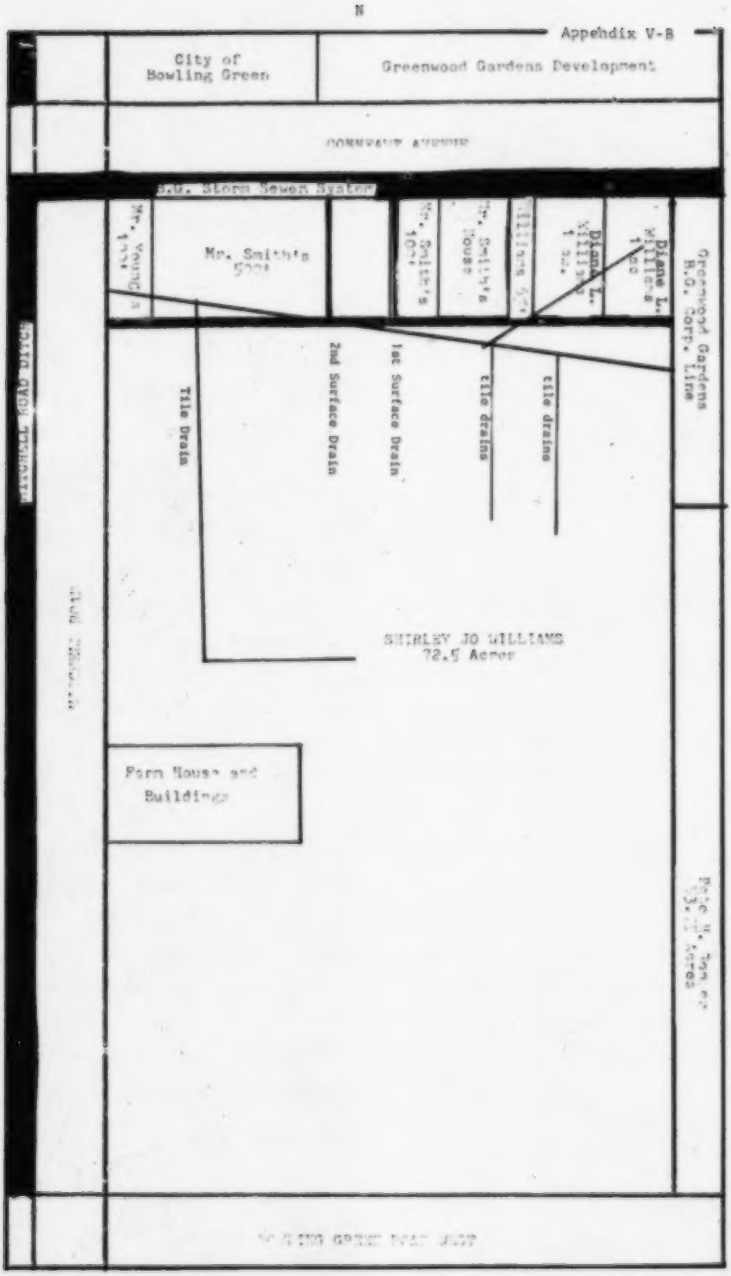
But it is claimed that only such easements as are termed "continuous" will pass by implication in a grant, and that such as are termed "discontinuous" will not. This is a distinction of the civil law, and has been incorporated in the law of some of the states, particularly Maine and Massachusetts. The former are such as operate without the intervention of man, such as drains and sewers; the latter require the intervention of man in their use, such as ways. The distinction is somewhat arbitrary and is not uniformly adopted, as will appear from the cases cited. The better rule, and the one now more generally adopted, is, not to consider the particular kind of easement, but whether it is apparent, designed to be permanent, and is reasonably necessary to the use of the premises granted. See the cases of *Kieffer* v. *Imhoff*, *Phillips* v. *Phillips*, *Cannon* v. *Boyd*, *U. S.* v. *Appleton*, *Paine* v. *Chandler*, *Mutual Life Ins. Co.* v. *Patterson*, *supra*. In *Phillips* v. *Phillips*, it is said "It may be granted that the continuance of drains, water pipes and mill-races may more distinctly indicate their permanent and essential nature than a private way; but when the permanency of the way is proved, confessed, or not disputed, the difference vanishes; they stand upon the same footing." In *Paine* v. *Chandler*, the court, after laying down the general rule, said: "The learned counsel for the appellant does not attack the principle, but his contention is, that the easement involved in this controversy is of the class known as 'discontinuous' and such an easement passes by implication only when absolutely necessary to the enjoyment of the property conveyed. To use his

own language, 'the rule contended for has been confined to cases where the easement was something without the use of which the premises would be practically worthless.' The rule is not confined in its applications to continuous easements, but applies to those artificial arrangements which openly exist and affect materially the value of the respective parts at the time of the sale."

The case of Francis's Appeal, 96 Penn. St., 200, to which our attention has been called, has been carefully examined, but we do not think that it in any way affects or modifies the previous decisions of that court. From the finding made by the master as to the nature and character of the uses there claimed as easements, on a severance of the properties, he could not well have held otherwise than he did.

Much importance is attached to the conclusion of law drawn by the court from the finding of facts, that the way in question is not a way of necessity. There is some room for doubt as to whether this conclusion from the facts found, was well drawn. But conceding that it is, still the authorities cited show, that in the case of a grant, this is not material where the way in question is reasonably necessary to the enjoyment of the land granted, and materially adds to its value. *Phillips* v. *Phillips*, 48 Penn. St., 178.

Judgment affirmed.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Appendix V-B
City of Bowling Green
Greenwood Gardens Development
Mr. Smith's 5 Ac.
Mr. Smith's House
Diane L. Williams 1 Ac.
Greenwood Gardens B.G. Corp. Line
Tile Drain
2nd Surface Drain
1st Surface Drain
tile drains
tile drains
SHIRLEY JO WILLIAMS
72.5 Acres
Farm House and Buildings
W
E

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Defendants'
Exhibit F-3

Defendants'
Exhibit G-5

Appendix

Supreme Court, U.S.
FILED
APR 7 1982
ALEXANDER L. STEVAS
CLERK

81-1862

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. _____

Howard Williams and Shirley Jo Williams
Appellants,

V.

James L. Smith and Patricia A. (J.) Smith
Appellees,

APPEAL FROM WOOD COUNTY COURT OF APPEALS
SUPPLEMENTAL APPENDIX

Howard & Shirley Jo Williams
Appellants Acting Pro Se
15236 Mitchell Road
Bowling Green, Ohio 43402

Martin L. Smith
Counsel of Record
for Appellees
920½ North Main Street
Bowling Green, Ohio 43402

TABLE OF APPENDICES

		Page
I.	A. *Judgment Entry* rendered November 12, 1980 overruled *Motion for New Trial*	A-1
II.	A. *Final Judgment Entry* rendered on October 10, 1979; judgment rendered in favor of Plaintiffs after trial	A-3
	B. *Decision and Journal Entry* of the Wood County Court of Appeals rendered April 11, 1980 in Case No. WD-79-52	A-6
	C. *Decision and Journal Entry* of the Wood County Court of Appeals filed May 7, 1981	A-11
	D. Transcript of May 11, 1981 Oral Argument in the Wood County Court of Appeals	A-12
	E. The Daily Sentinel-Tribune newspaper article citing "baked goods"	A-24
	F. *Decision and Journal Entry* of the Wood County Court of Appeals rendered June 9, 1981 concerning *Motion for Voluntary Removal*	A-26
	G. Letter from the Supreme Court of Ohio concerning *Motion for Voluntary Removal*	A-28
	H. Letter from the Supreme Court of Ohio *Motion for Disqualification*	A-29
III.	A. *Decision and Journal Entry* of the Wood County Court of Appeals rendered June 5, 1981 in Case No. WD-80-81	A-30
	B. *Order* of the Supreme Court of Ohio -- denying rehearing	A-32
	C. *Order* of the Supreme Court of Ohio -- overruling Motion to Certify Record	A-33

D. *Order* of the Supreme Court of Ohio -- dismissing *Appeal as a Matter of Right* A-34

IV. A. *Notice of Appeal* to the Supreme Court of the United States A-35

V. A. Baker v. Rice, 56 Ohio St 463 ..... A-38

B. Map showing disputed property and drainage systems A-53

C. Pertinent Photographic Evidence Presented at the trial of Case No. 78-CIV-340 ..... A-54

Appendix I-A

IN THE COURT OF COMMON PLEAS
OF WOOD COUNTY, OHIO

James L. Smith, et al.,	*	**Case No. 78 CIV-340**
Plaintiff	*	
vs.	*	**JUDGMENT ENTRY**
Howard Williams, et al.,	*	
Defendant.	*	

This case came on before the Court on defendants' "Notice Of Appearance" and "Motion For A New Trial" both filed November 7, 1980. The apparent basis for defendants' motion, as stated therein, is "There are several instances in which it appears that the jury verdict and the court's decision conflict with the Ohio Revised Code and Ohio Jurisprudence." The Court, having fully considered the pleadings and the applicable law, finds defendants' motion not well-taken and the same is hereby overruled.

On October 10, 1979 a Final Judgment Entry was placed of record reflecting the jury verdict of October 1, 1979 in favor of plaintiffs'. Thereafter, on October 15, 1979, defendants' filed a "Motion" for relief from judgment, a new trial, judgment notwithstanding verdict, and a remittiter. This motion was overruled in its entirety by Judgment Entry placed of record October 30, 1979. On November 29, 1979 defendants filed a "Notice of Appeal." The Sixth District Court of Appeals, upon review of this case, affirmed in all respects the jury verdict. Defendants' Motion To Certify The Record Of The Court Of Appeals, to the Ohio Supreme Court was overruled on September 12, 1980.

In passing upon defendants' motion for new trial the Court is guided by Rule 59 (B) of the Ohio Rules of Civil Procedure which states:

"(B) A motion for new trial shall be served not later than fourteen days after the entry of the judgment."

Clearly defendants' motion is out of rule at this late date. It is therefore ORDERED, ADJUDGED, and DECREED that defendants' motion for a new trial filed November 7, 1980 is overruled, at defendants' costs.

A copy of this Judgment Entry is being sent to counsel for plaintiff and to defendants personally by the clerk of this court. Mailed 11/13/80.

November 12, 1980	Donald D. Simmons
Date	Judge

Appendix II-A

IN THE COMMON PLEAS COURT
OF WOOD COUNTY, OHIO

James L. Smith et al.,
Plaintiffs,

Case No. 78-CIV-340

//

vs.

Howard Williams et al.,
Defendants.

FINAL
JUDGMENT ENTRY

This cause came on for hearing October 1, 1979 before the Honorable Donald D. Simmons, Judge, and a jury consisting of the following persons: Chester Kadas, Linda Whitney, Ralph Francisco, Lloyd Culbertson, Claudette Davis, Yvonne Mower, Joan Jeffers Tonjes, Linda Myers and Alternate Juror Jane Seeley.

Present in Court were the parties, with the plaintiffs being represented by Attorney Martin Smith and the defendants being represented by Attorney John S. Cheetwood and Attorney Rex Huffman.

Prior to trial the following Exhibits were marked for purposes of identification: Plaintiffs' Exhibit 1, through 5 and Defendants' Exhibits A-1 through N-2. Motion for separation of witnesses was concurred in by both plaintiffs and defendants and the same was granted.

The jury heard the opening statements of counsel, after which they were conveyed for the jury view, a motion having been made for a view by the plaintiffs and granted by the Court. Thereupon, the jury view having been concluded, the jury heard testimony from the following witnesses: James Smith, Patricia Smith, Shirley Jo Williams as upon cross examination, Mark Bushman, and Bill Hofner. Plaintiffs moved for the ad-

mission of Plaintiffs' Exhibits 1 through 5 and Plaintiffs' Exhibit 1 was admitted over the objection of defense counsel, while Plaintiffs' Exhibits 2 through 5 were admitted without objection. Plaintiffs thereupon rested.

Thereupon defendants moved for a directed verdict, and following the arguments of counsel, the Court withheld ruling on whether or not the plaintiffs had proved trespass on the part of Shirley Jo Williams or Howard Williams and found that maximum damages in the amount of $1,000 had been presented to the jury. The court found that malice had not been proved on the plaintiffs' case in chief and granted a directed verdict on that issue. The Court further ruled that right to possession of the property had been admitted by defendants.

Thereupon defendants presented evidence through the following witnesses: Gene Nagle and Diane Williams, after which the Court adjourned at 4:25 P.M. for the day, at the conclusion of the direct examination of Diane Williams.

Court readjourned on October 2, 1979 and the defendants presented further evidence through the following witnesses: Conclusion of the testimony of Diane Williams, Howard Williams, Liz Bivins and John Heyman. Defendants moved for the admission of Defendants' Exhibits A-1 through A-4, Defendants' Exhibits C through H-5, Defendants' Exhibits M-3 and N-1 through N-2. Defendants' Exhibits B-1 through B-3, I-1 through 1-6, J, K, L, M-1 and M-2 were withdrawn by counsel for the defendants. There being no objection, Defendants' Exhibits C through H-5 were admitted, Defendants' Exhibits M-3, N-1 and N-2 were admitted, and over the objection of plaintiffs, Defendants' Exhibits A-1 and A-2 were admitted. Defendants' Exhibits A-3 and A-4 were rejected.

Thereupon defendants rested and plaintiffs moved for directed verdict on the defendants' counterclaim.

Following arguments, the Court granted a directed verdict in favor of the plaintiffs on the issues of punitive damages, weeds as a nusiance, and trespass concerning the septic tank drain.

Thereupon the plaintiffs presented the following witnesses upon rebuttal: Donald McNeely, Kenneth C. Dean, Jr., during whose testimony Plaintiffs' Exhibit 6 was identified, Pete Gonyer, Doug McKnight.

Thereupon both the plaintiffs and the defendants rested, and plaintiffs moved for the introduction of Plaintiffs' Exhibit 6, which was rejected.

Defendants renewed their motion for directed verdict and the Court held that trespass on the part of Shirley Jo Williams and Howard Williams was a jury question and reaffirmed that money damages to plaintiffs were limited by the evidence to $1,000. Thereupon the Court adjourned.

Court readjourned October 3, 1979, whereupon the jury heard the closing arguments of counsel and the charge of the Court, after which the jury deliberated and returned a verdict on the Plaintiffs' complaint in behalf of plaintiffs in the amount of $1,000 and a verdict on the defendants' counterclaim in favor of the plaintiffs.

It is, therefore, ORDERED AND JUDGMENT RENDERED on the Jury Verdict in favor of the plaintiffs, James L. Smith and Patricia Smith and against the defendants Howard Williams and Shirley Jo Williams in the amount of $1,000.00 on the plaintiffs' complaint and in favor of the plaintiffs James L. Smith and Patricia Smith on the defendants' counterclaim. The costs of this action shall be taxed to the Defendants and this cause is hereby concluded.

A copy of this judgment entry to counsel of record.

October 10, 1979	Donald D. Simmons
Date	Judge

Appendix II-B

COURT OF APPEALS OF OHIO, SIXTH DISTRICT
COUNTY OF WOOD
C. A. NO. WD-79-52

James L. Smith and Patricia A. Smith APPELLEES	**APPEAL FROM WOOD COUNTY COMMON PLEAS COURT**
-VS- Howard Williams and Shirley Jo Williams APPELLANTS	**NO. 78-CIV-340** **DECISION & JOURNAL ENTRY**
DATE April 11, 1980	

This cause came on to be heard upon the record in the trial court. Each assignment of error was reviewed by the court and upon review the following disposition made:

Plaintiffs-appellants initiated this case in the Wood County Court of Common Pleas, alleging that defendants-appellants trespassed on their property. Defendants denied this and filed a counterclaim.

The case proceeded to trial. The defendants moved for a directed verdict after the plaintiffs rested. The trial court limited the issue of plaintiffs' damages to the sum of $1,000 and directed a verdict in favor of defendants on the issue of punitive damages.

The defense then presented its case in chief and the plaintiffs moved for a directed verdict at its conclusion. The court directed a verdict on three of defendants' counterclaims.

The remaining issues were then submitted to the jury which returned a $1,000 verdict for the plaintiffs. The court overruled defendants' motion for judgment notwithstanding the verdict.

Plaintiffs James and Patricia Smith owned property in Bowling Green, Ohio. Defendants Howard and Shirley Williams owned 72.5 acres which was adjacent to the southern portion of the Smiths' land.

In late October of 1978, Howard Williams plowed two furrows from the 72.5 acre parcel across plaintiffs' property from the street. Williams claimed these furrows were for drainage purposes. The Smiths claimed Williams' action constituted a trespass. Defendants argued that they had a legal right to plow furrows over the plaintiffs' property.

The Smiths' septic tank had been discharging sewage onto defendants' property for some time. The Williams claimed that this constituted a trespass.

The defendants have advanced five assignments of error, the first of which is as follows:

> "1. IN A CLAIM FOR DAMAGES FOR INJURY TO REAL PROPERTY, IT WAS ERROR TO DENY DEFENDANTS' MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF PLAINTIFFS' CASE WHERE THE EVIDENCE REVEALED A FAILURE BY PLAINTIFFS TO PRESENT EVIDENCE OF THE REAL PROPERTY'S FAIR MARKET VALUE IMMEDIATELY BEFORE AND IMMEDIATELY AFTER THE ALLEGED INJURY."

It is true that the plaintiffs failed to introduce evidence of the property's fair market value immediately before and immediately after the injury. It is also true that the absence of such evidence is immaterial since the diminution of the property's value was not the proper measure of damages in this case. That would have been the proper measure of damages had the plaintiffs' property been permanently injured, for instance if it had been destroyed. 22 Am. Jur 2d, Damages §§134-135. But since the plaintiffs suffered only a temporary injury

to their property, the cost of repair was the proper measure of damages. Id. The plaintiffs introduced evidence relevant to that standard.

Interestingly, the defendants have not suggested that the trial judge erred in instructing the jury on the damages issue. This can be ascertained by studying the argument they advanced in support of their fourth assignment of error. Their argument begins, "In the present case the Trial Court correctly instructed the jury as to the proper measure of damage for an injury to real property."

The first assignment of errort is not well taken.

Defendants' second assignment of error is as follows:

> "2. IN A CLAIM FOR DAMAGES FOR INJURY TO REAL PROPERTY, IT WAS ERROR FOR THE TRIAL COURT TO DENY DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT WHERE THE RECORD REVEALS THAT THERE WAS NO DIFFERENCE IN THE FAIR MARKET VALUE OF PLAINTIFFS' PROPERTY IMMEDIATELY BEFORE AND IMMEDIATELY AFTER THE ALLEGED INJURY."

For the reasons previously expressed, the second assignment of error is not well taken.

Defendants' third assignment of error is as follows:

> "3. IT IS ERROR WHERE THE RECORD REVEALS THAT THE JURY FAILED OR REFUSED TO FOLLOW THE COURT'S INSTRUCTION AS TO THE PROPER MEASURE OF DAMAGES TO BE APPLIED IN THE CASE."

Our review of the record reveals that the jury applied the law as the judge instructed them to do. Accordingly, the third assignment of error is not well taken.

Defendants' fourth assignment of error is as follows:

"4. IT WAS ERROR FOR THE TRIAL COURT TO GRANT PLAINTIFFS' MOTION FOR DIRECTED VERDICT ON DEFENDANTS' COUNTERCLAIM ALLEGING THAT PLAINTIFFS WERE TRESPASSING ON DEFENDANTS' REAL PROPERTY BY DISCHARGING UNTREATED SEPTIC TANK SEWAGE ONTO DEFENDANTS' REAL ESTATE."

Defendants argue that on the facts presented they were entitled to injunctive relief. The trial court found that they failed to show any evidence of damages. Naturally, without a showing of damages the irreparable harm necessary to invoke injunctive relief cannot exist. The fourth assignment of error is not well taken.

Defendants' fifth assignment of error is as follows:

"5. THE JURY VERDICT DENYING DEFENDANTS' COUNTERCLAIM THAT PLAINTIFFS HAD OBSTRUCTED A NATURAL EASEMENT RIGHT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

The jury's verdict was supported by some competent, credible evidence going to all the essential elements of defendants' counterclaim. Hence, we will not reverse that verdict as being against the manifest weight of the evidence. C. E. Morris Co. v. Foley Construction Co. (1978), 54 Ohio St. 2d 279.

We find that substantial justice has been done and the judgment of the Wood County Court of Common Pleas is affirmed. This matter is remanded to said court for execution of judgment and for costs. Costs assessed against appellants.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See also Supp. R. 4, amended 1/1/80.

Clifford F. Brown, J. _____
JUDGE

John J. Connors, Jr., J.

John J. Connors, Jr.
JUDGE

Frank W. Wiley, J. concur.

Frank W. Wiley
JUDGE

Judge Frank W. Wiley, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

Appendix II-C

IN THE COURT OF APPEALS OF WOOD COUNTY

James L. Smith, et al,
APPELLEES

-vs-

Howard Williams, et al,
APPELLANTS

COURT OF APPEALS
NO. WD-80-81

TRIAL COURT
NO. 78-CIV-340

DECISIONS AND JOURNAL ENTRY

DATE May 5, 1981

Appellees not having filed an answer brief herein, motion to be heard at oral argument on the merits of the case is denied. Appellees will be limited to oral argument on their motion to dismiss, to which appellants may respond. Appellants may then present argument on their assignments of error.

John W. Potter,
Andy Douglas and
Frank W. Wiley, JJ.,
concur.

John W. Potter
Judge

Andy Douglas
Judge

Frank W. Wiley
Judge

Judge Frank W. Wiley, Retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio. Vol. 3, Pg. 455

Appendix II-D

Partial Transcript of the Oral Argument of Case No. WD-80-81 held on May 11, 1981

Judge Wiley: "Wasn't there a *Motion for Discovery?*"

Martin Smith: "No. The only grounds for a *Motion for a New Trial* was 'to ascertain the truth.' And it is not based, and it is not a *Motion for a New Trial* based on the grounds of--"

Judge Wiley: "Do we have a record of this new trial...did our record of this...these records--"

Martin Smith: "I don't know."

Judge Wiley: "I mean in our, in anything you have filed with the Court that would lead to...or dispute it."

Martin Smith: "No, Your Honor."

Judge Wiley: "In the records."

Martin Smith: "No, Your Honor."

Judge Douglas: "Without a *Motion for a New Trial,* because withouth a *Motion to Compel Discovery* in the sense that it was not proper procedure...he has filed a *Motion for a New Trial.* Without a *Motion for a New Trial,* he denied it. So in fact, we are only here on one issue. And that is, did the judge properly deny the *Motion for a New Trial.* I can't see that it is so difficult."

Martin Smith: "That is correct, Your Honor."

Judge Potter: "You're out of order at this time. We're going to let...qualified to argue on the briefs also..."

Martin Smith: "Well, my *Motion to Dismiss* is not--"

Judge Wiley: "A copy of the order of the Appeals trial...tried to put back the trays for the purpose of...the order appealed from was sought."

Martin Smith: "The order appealed from, Your Honor, was--"

Judge Wiley: "In the Appeals trial--"

Martin Smith: "Was a judgment entry--"

Judge Wiley: "Every time we have to read 10 pages of brief before we find out what they're doing."

Martin Smith: "The order appealed from is the judgment entry which was placed of record on November 13, 1980 overruling the Appellants' *Motion for a New Trial.* This was filed over a year after--"

Judge Wiley: "Thank You."

Martin Smith: " ..... "

Judge Wiley: " ..... "

Martin Smith: "My *Motion to Dismiss* is based upon the tried and true policy that there only should be one review and they have had the opportunity to litigate all of these matters before. We have had a trial on it, we have gone through the Court of Appeals, and

the Supreme Court on it, and we have been affirmed in all respects."

Judge Potter: "Is that your argument?"

Martin Smith: "That is my argument."

Judge Potter: "I will ask you to sit down. We will hear from the Williams. I think probably we can combine both your argument on the *Motion* and your merit argument and I hope you will not exceed 15 minutes together...it on this afternoon."

Shirley Williams: "I hope so too, because I have got throat trouble."

Judge Potter: "I'll tell you what we'll do, we'll help you."

Shirley Williams: "I would appreciate it."

Judge Potter: "When your time is up, we'll tell you."

Shirley Williams: "First of all, Your Honor, thank you for seeing us."

Judge Potter: "I should introduce the panel. This is a Court of Appeals for the Sixth District in the County of Wood, and we are all duly elected or assigned. To my left is Judge Andy Douglas who was elected, to my left is Judge Frank Wiley who is retired sitting by assignment, and I'm Judge Potter. We've read everything that has been presented in the way of briefs. We have not been through this record. This recording devise is only for our note taking. It does not make a record. It makes a recording, but not

a record in the legal sense. Mr. Whitaker will warn you say at 12 minutes, and then you will have 3 minutes to summarize."

Shirley Williams: "Alright, first of all, Your Honor, thank you for seeing us. We understand that this is a little unusual procedure, but we've had the run-around from the attorneys and the issues are of such grave matters, that honestly we feel that we are the only ones who can really explain what in the world has been going on for about the last 3 years. Now, first of all, and to put it very simply, we want a new trial."

Judge Douglas: ".... Are you Shirley?"

Shirley Williams: "I am Shirley."

Judge Douglas: "You didn't identify yourself."

Shirley Williams: "Pardon."

Judge Douglas: "You didn't identify yourself."

Shirley Williams: "Oh excuse me, I am Shirley Williams, and my husband is Howard. This is Howard. And this young lady with all of the pictures, this is my daughter, Diane."

Judge Wiley: "Thank You."

Shirley Williams: "Now, to put it very briefly, we need a new trial because from the very beginning the first one got so messed up, jammed up, fuddled up, fooled up, that it was just a complete total waste of time. The real issues never were brought out. And instead of the real issues, it was a smokescreen of

nonsense. So, the real issues got shoved off in a corner, and the smokescreen is what went through the courts. And we still have not had many issues. Now listen, WE HAVE A DRAINAGE PROBLEM."

Judge Wiley: "Well, before you get into the drainage problem, we want to hear you on the *Motion*--"

Shirley Williams: "That is--"

Judge Wiley: "To Dismiss--"

Shirley Williams: "O.K., now-"

Judge Wiley: "And the reason for the *Motion to Dismiss.*"

Shirley Williams: "The reason to Dismiss--"

Judge Wiley: "That you had your day--case was heard by the trial court; it went to the Court of Appeals, and you lost there; and it went to the Supreme Court--"

Shirley Williams: "Well--"

Judge Wiley: "And you got an adverse decision. Now, on what basis can you possibly get into--"

Shirley Williams: "Alright, for--"

Judge Wiley: "Even, even having a new trial considered."

Shirley Williams: "Well, for--"

Judge Wiley: " ..... "

Shirley Williams: "Well, for--Mr. Smith charges us with being frivolous. A frivolous appeal."

Judge Wiley: "Where?"

Shirley Williams: "That was in his *Motion to Dismiss.* That was his main issue was that it was a frivolous appeal."

Judge Wiley: "Then there was nothing to appeal. That it was already--had your day in court. And already had your trial. So, there was nothing on which you could really appeal."

Shirley Williams: "Well, let's see."

Judge Wiley: "What was your real reason to appeal for the new trial? The trial court did what that you don't like?"

Shirley Williams: "Well, to begin--"

Judge Wiley: "In this in, in this second round."

Shirley Williams: "In this second round, the Defendant, Shirley Williams, did not have her day in court. That she testified on behalf of the Plaintiffs. She was never testified for her own case. She was not cross-examined by her defense attorney. And if you have checked the papers, which you haven't done, so you haven't seen this segment; she is the only witness that was put in this position. That she was examined on, it says: "as on cross-examination," by Mr. Smith."

Judge Wiley: "Mrs. Williams, ordinarily a *"Motion--"*

Shirley Williams: "I'm talking about me. Do you want this in the third person, or the first person? It doesn't matter."

Judge Potter: "We read your mind, too so--"

Shirley Williams: "I didn't know how formal you

wanted to make it."

Judge Wiley: "Ordinarily, when you file a *Motion for a New Trial,* you set out *Grounds for a New Trial."*

Shirley Williams: "O.K."

Judge Wiley: "What grounds did you set out, tell us what you approximately considered as grounds for a new trial."

Shirley Williams: "Well, my major ground was that the first trial was a violation of my Constitutional Rights. That there were so many laws violated and so many rules of procedure--"

Judge Wiley: "Now, wasn't, didn't you originally file a *Motion for a New Trial* in the original case, before you came up here?"

Shirley Williams: "Uh, that was a bunch of the paperwork that went through. But the ISSUES, that's what I'm trying to say; the meat never went through the appeals procedure."

Judge Wiley: "We certainly have went through something up here before..."

Shirley Williams: "You have went through a TON of paperwork. And we have went through a ton of paperwork. I've got a three-drawer file cabinet at home full of paperwork--"

Judge Wiley: "I don't quite under---"

Shirley Williams: "And it's ridiculous."

Judge Wiley: "I don't quite understand how you can see this as grounds for a new trial when you already had a new trial mo-

tion originally, and it was...."

Shirley Williams: "It was defeated for the same reason that the first trial was defeated, for the same reason that Judge Simmons will not allow me a Topographical Map, for the same reason that everything was defeated in the first place."

Judge Wiley: "Well, then you really want to go into, back into the original case and open that up and introduce new evidence."

Shirley Williams: "I can't see any other way that we can straighten out this mess. Right now, gentlemen, they have taken away my drainage away from me."

Judge Wiley: "The reason, the reason why it is somewhat difficult for you to do that now is because you have already had that opportunity to do it in the first round. Now maybe it wasn't done."

Shirley Williams: "It wasn't done, Your Honor."

Judge Wiley: "But you had, but you had the opportunity to do it."

Shirley Williams: "It wasn't done probably because the attorneys didn't work for us. They were working for someone else, they weren't working for us. They were paid by us, but they were not working for me. Mr. Cheetwood never defended me in Court. And Mr. Smith threw a lot of garbage at me; a lot of other incriminating tactics. I testified and incriminated myself, and now that's a violation of my

Constitutional Rights. Now, I -- maybe you have some other solutions, and we are certainly willing to hear them, if you have got any other way that we can straighten this out; but, from our point of view, and from what law we have read, the only way we can straighten out the issues so that we have the freedom of enterprise and the freedom to earn a living and justice, is to go back and start over."

Judge Wiley: "Quite possibly, quite possibly be from what you've stated that you have not much relief from the officers of the courts in...acceptable action because your attorneys didn't do what you wanted and what you could have done and so...Let's take the example now of when the case first came up. Let's say that the attorney who didn't notify you of a trial date, and the case would have been dismissed. So you never had, so you never even got it into court. So, the case was dismissed because the lawyer didn't tell you. And you went away and when you came back he said, 'well, I, oh, I should have told you that your case was coming up and you were gone and the judge dismissed the case.'...and I can't go back in. Do you understand what I'm saying? The Court probably would then be closed to you because you had your opportunity to go in and you weren't there when you should

be. Now, you were there, but you say you didn't come out properly because something the attorney failed to do, properly conducted yourself, you might possibly have some claim with the attorney. You had, you had your day in court as it is called."

Shirley Williams: "Well, what was--"

Judge Wiley: "Although it was unsatisfactory to you. You were there, weren't you?

Shirley Williams: "I was--"

Judge Wiley: "You testified."

Shirley Williams: "I."

Judge Wiley: "You had a trial."

Shirley Williams: "I was there at a hanging. It was not a Court of Justice and it was not a trial in the sense of the legal word and in the sense of the Constitution of the State of Ohio, and in the sense of the Constitution of the United States. That was not a fair, just trial. Gentlemen, I haven't been through a trial yet."

Judge Douglas: "Was there a jury present on this?"

Shirley Williams: "Yes."

Judge Douglas: " ..... alright."

Shirley Williams: "It was a jury."

Judge Douglas: "It was a jury wasn't it? O.K."

Shirley Williams: "It was a jury of 8 people. It was made up of 5 women. So, Mr. Smith takes the first 2 hours and throws garbage at me. 5 women to decide technical drainage topographical

issues. 5 middle-aged housewives. So, what does Mr. Smith do, he throws a bunch of character assassination garbage at me."

Judge Douglas: "Now, let's stop right there. What you have--get Mr. Smith out of the picture and say everything you said is true and not true, which every way you want to do it, your attorneys the same thing, and the judge the same thing, and in the end, 8 people heard all of it, didn't they?"

Shirley Williams: "No."

Judge Douglas: "They didn't? They heard everything that went on in the Courtroom, didn't they?"

Shirley Williams: "They didn't hear the true issues."

Judge Douglas: "But, they heard everything that went on in that trial?"

Shirley Williams: "They heard everything that went on in, they heard--"

Judge Douglas: "In that proceeding."

Shirley Williams: "Yeah, in that proceeding."

Judge Douglas: "Alright, and they ruled against you, didn't they?"

Shirley Williams: "In that proceeding."

Judge Douglas: "Now, what you're here on, is that you're trying to open up that whole thing again and try it with three judges when that has to be done in the lower court. All we are here today is...a Motion for a New Trial...denied a Motion for a New Trial. We just need to hear whether

or not why you think you need a new trial without having all of the evidence. You think that the judge did not use his discretion in not granting you the new trial?"

Shirley Williams: "Yes, I do. I think we need--I think a new trial is in order as the only way to clean up this mess."

Judge Douglas: "I think that sums it up."

Shirley Williams: "I think so too."

Judge Potter: "Does this conclude your argument?"

Shirley Williams: "Would you like to see our pictures? My daughter put an awful lot of work into them.

Judge Potter: " ..... "

Shirley Williams: "Pardon."

Judge Potter: "Are those matters in evidence?"

Shirley Williams: "Yes."

Judge Potter: "These pictures are?"

Shirley Williams: "Yes, they are in the evidence that went with the--"

Judge Potter: "Then we'll see them when we review the record."

Shirley Williams: "Would you like me to explain this drainage?"

Judge Potter: "No, I think that we'll be able to understand it."

Shirley Williams: "Howard, is there anything you would like to add?"

Conclusion of Proceedings unintelligble

Exhibit A

Appendix II-E

THE DAILY SENTINEL-TRIBUNE—BOWLING GREEN, OHIO

Thursday, May 28, 1981

Simmons issues court order for $5.92 payment for baked goods

Wood County's auditor is not particularly happy about being court-ordered to pay for $5.92 worth of baked goods.

The baked goods were furnished to the judges of the Sixth District Court of Appeals when the judges met in Wood County in May.

Harold Bateson received the court order on Tuesday to reimburse Jacqueline Gallagher, an employee of Judge Donald D. Simmons' Common Pleas Court, for baked goods purchased from Peterson's Bakery on May 11.

The appeals judges were meeting in the County Office Building that day to hear appeals cases, including Bateson's appeals of previous court orders issued by Simmons.

Bateson said Wednesday he did not think it was ethical that the baked goods were furnished by the common pleas court on the very day that the appeals cases of Bateson vs. Simmons were being heard.

Bateson informed the Wood County commissioners on Wednesday he decided to pay for the baked goods out of his own pocket, rather than use county funds for the reimbursement.

Simmons filed the court order on Friday, asking that Mrs. Gallagher be reimbursed from the common pleas court budget.

Mrs. Gallagher said it was not the first time baked goods had been furnished for the visiting appeals court judges. She also said she thought payment for the baked goods previously provided to visiting judges was made in the same way as Simmons requested on Friday.

Bateson checked the bills sent to him by the common pleas court back through 1980. He could find no other instance of a specific request for payment for baked goods.

But he said such past requests from the court could have been contained under the requests to pay other expenses of the court.

Appendix II-F

IN THE COURT OF APPEALS OF WOOD COUNTY

James L. Smith, et al.
APPELLEES

-vs-

Howard Williams, et al.
APPELLANTS

DATE June 9, 1981

COURT OF APPEALS
NO. WD-80-81

TRIAL COURT NO.
CV 78-340
DECISION AND
JOURNAL ENTRY

Appellants' motion for "Voluntary Removal of Appellate Judges on the Grounds of Undue Influence by an Interested Party" came on for consideration. This court finds that it is without jurisdiction to rule on said motion. The motion should be filed with the Chief Justice of the Ohio Supreme Court. The clerk of courts is ordered to forward said motion to the Chief Justice on the Ohio Supreme Court pursuant to Article IV, Section 5 (C), Ohio Constitution.

The panel, however, asserts that it had no knowledge of who provided the baked goods in question, that they were delivered after the court was in session, and no member of the panel consumed any portion thereof.

Two of the members of the court had a cup of coffee but, scrupulously followed the instructions posted over the coffee pot, to wit; "If you drink it, pay for it."

In compliance with the instruction, the members of the panel deposited a sum of money in excess of the reasonable value of the coffee consumed.

John W. Potter, J.
Andy Douglas, J.
Frank W. Wiley, J.
concur.

John W. Potter
Presiding Judge

Andy Douglas
Judge

Frank W. Wiley
Judge

Vol. 3, Pg. 455

Appendix II-G

The Supreme Court of Ohio

Columbus

June 12, 1981

Honorable Betty J. Haas
Clerk of Courts
Wood County Courthouse
Bowling Green, Ohio 43402

Re: Case No. C.A. WD-80-81; James L. Smith, et al. v. Howard Williams, et al.

Dear Ms. Haas:

I am herewith returning the "motion for voluntary removal of appellate judges on the grounds of undue influence by an interested party" which was filed in the above-styled cause.

The motion for voluntary removal of judges is not an affidavit of prejudice or motion for disqualification which would be cognizable under Section 5(C), Article IV of the Constitution of the State of Ohio.

Sincerely,

FRANK D. CELEBREZZE
Chief Justice

FDC/jm
Enclosure
cc: Honorable John W. Potter
Mr. Howard A. Williams
Ms. Shirley Jo Williams

Appendix II-H

The Supreme Court of Ohio
Columbus

July 13, 1981

Honorable Betty J. Haas
Clerk of Courts
Wood County Courthouse
Bowling Green, Ohio 43402

Re: Case No. WD-80-81; James L. Smith, et al. v. Howard Williams, et al.

Dear Ms. Haas:

Inasmuch as the Court of Appeals for Wood County has heard and decided the above-styled cause, the motion for disqualification filed therein against the Court is moot.

It will therefore not be necessary to rule upon the motion and it is being returned herewith.

Sincerely,

FRANK D. CELEBREZZE
Chief Justice

FDC/jm
Enclosure
cc: Honorable John W. Potter
Mr. Howard A. Williams
Ms. Shirley Jo Williams

Appendix III-A

Exhibit F

IN THE COURT OF APPEALS OF WOOD COUNTY

James L. Smith, et al. APPELLEES	**COURT OF APPEALS NO. WD-80-81**
-vs-	
Howard Williams, et al. APPELLANTS	**TRIAL COURT NO. 78-CIV-340**
DATE June 5, 1981	**DECISION AND JOURNAL ENTRY**

This appeal was heard on appellees' motion to dismiss appeal, for reasonable attorney fees and costs, briefs filed in support and against said motion, and oral argument; and also on appellants' assignments of error and brief, and oral argument. Appellants appeared pro se. Appellees filed no merit brief and were not permitted to participate in oral argument.

The court first considers the motion to dismiss and finds it well taken for the reason that this court passed upon or could have passed upon all issues subject to appeal from the October 10, 1979, trial court judgment in our judgment entry dated April 11, 1980, in case No. WD-79-52.

Motion of appellees to dismiss is granted. Attorney fees for appelles are denied. Appeal is dismissed at appellants' costs and cause remanded to the Wood County Common Pleas Court for execution for costs.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See also Supp. R. 4, amended 1/1/80.

John W. Potter, J.
Andy Douglas, J.
Frank W. Wiley, J.
concur.

John W. Potter

Andy Douglas
Judge

Frank W. Wiley
Judge

Judge Frank W. Wiley, Retired sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

Appendix III-B

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, *City of Columbus.*	*1981 TERM* *To wit: December 23, 1981*
James L. Smith et al., Appelles, vs. Howard Williams et al., Appellants.	*No. 81-1187* **REHEARING**

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, of Clerk the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. _____ Page _____
IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 23rd day of December 1981
THOMAS L. STRATZMAN, Clerk.
By Sam F. Jenkins, Deputy.

Appendix III-C

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, *City of Columbus.*	*1981 TERM* *To wit: November 25, 1981*
James L. Smith et al., Appellees, vs Howard Williams et al., Appellant.	No. 81-1187 **MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS** *for Wood County* **TO CERTIFY ITS RECORDS**

It is ordered by the Court that this motion is overruled.

COSTS:-
Motion Fee $20.00, paid by Shirley Jo Williams

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.
Witness my hand and the seal of the Court this _____ day of Dec. 23, 1981

THOMAS L. STRATZMAN, Clerk

Sam F. Jenkins, Deputy

Appendix III-D

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,
City of Columbus.

1981 TERM
To wit: November 25, 1981

James L. Smith et al.,
Appellees,
vs.
Howard Williams et al.,
Appellants.

No. 81-1187
APPEAL FROM THE COURT OF APPEALS

for Wood County

This cause, here on appeal as of right from the Court of Appeals for Wood County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Wood County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this _____ day of Dec. 23, 1981

THOMAS L. STARTZMAN, Clerk

Sam F. Jenkins, Deputy

Appendix IV-A

IN THE COURT OF APPEALS OF WOOD COUNTY, OHIO SIXTH APPELLATE DISTRICT

James L. Smith	:	Wood County, Ohio
and	:	Common Pleas Case No. 78-CIV-340
Patricia A. (J.) Smith	:	Sixth District Court of
Plaintiff-Appellees,	:	Appeals, Toledo, Ohio Case No. WD-80-81
vs	:	Ohio Supreme Court
Howard Williams	:	Case No. 81-1187
and	:	
Shirley Jo Williams,	:	
Defendant-Appellants.	:	

***

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Howard and Shirley Jo Williams, the appellants above-named, hereby appeal to the Supreme Court of the United States from the *Decision and Journal Entry* of the Wood County Court of Appeals rendered on June 5, 1981 and filed of record on June 8, 1981. The *Order* of the Supreme Court of Ohio denying rehearing on the *Appeal as a Matter of Right* and the *Motion to Certify the Record* was entered on December 23, 1981, and filed in the Wood County Court of Appeals on December 28, 1981.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph (1).

The Defendant-Appellants are pursuing this appeal personally as provided by Title 28, United States Code Section 1654.

Dated March 10, 1982.

Howard Williams
15236 Mitchell Road
Bowling Green, Ohio 43402
telephone: (419) 352-2477

Shirley Jo Williams
15236 Mitchell Road
Bowling Green, Ohio 43402
telephone: (419) 352-2477

PROOF OF SERVICE

I, Shirley Jo Williams, appellant herein, acting pro se, hereby certifies that on March 10, 1982, pursuant to Rule 28 (3), Rules of the Supreme Court, I served a copy of the foregoing *Notice of Appeal to the Supreme Court of the United States* on each of the parties herein' as follows:

On James L. Smith and Patricia A. (J.) Smith, appellees herein, by depositing such copy in the United States Post Office, Bowling Green, Ohio, with first class postage prepaid, certified mail, return receipt requested, properly addressed to the post office address of Martin L. Smith, the above named appellees' counsel of record at 920½ North Main Street, Bowling Green, Ohio 43402.

All parties required to be served have been served.

Dated March 10, 1982.

Shirley Jo Williams
15236 Mitchell Road
Bowling Green, Ohio 43402
telephone: (419) 352-2477

BAKER *v.* RICE.

Easement — Implied grant.

Where once who is the owner of a body of land, during his occupancy of it, constructs a private way over one part of it to another as a means of egress and ingress to the latter from his home and also to the public highway, which way is apparent, continually used, and reasonably necessary to the use and enjoyment of the land to which the way is constructed, and, also, adds materially to its value, conveys by deeds of the same date, the part with the way to it to one of his children and the part with the way over it to another one of them each takes his part to be enjoyed with reference to the way as the same existed at the time of the division — the one with an implied grant of the way to it, and the other subject to such way as an easement therein.

(Decided June 8, 1897.)

On Error to the Circuit Court of Knox county.

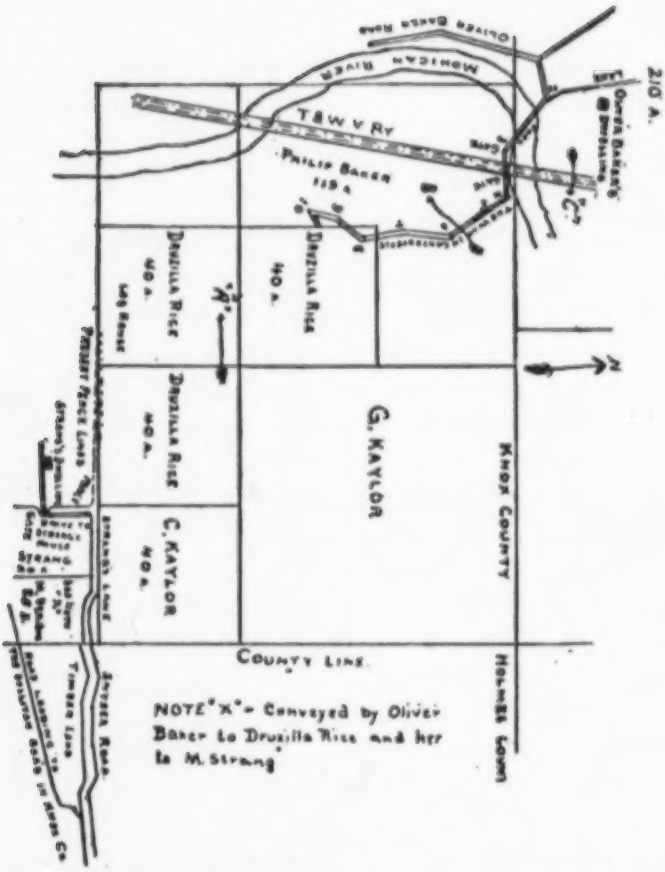
In this case the action below was commenced by the plaintiff, Druzilla Rice, against the defendant, Phillip Baker, to enjoin the latter from obstructing a private way she claimed over his premises to the public highway as incident to her own land. The defendant denied the right of the plaintiff. A temporary injunction was obtained at the commencement of the action, which, at the

hearing on the merits, was made perpetual. The cause was appealed to the circuit court, where it was tried with the same result as in the common pleas. On the trial the court made a finding of the facts and its conclusions of law thereon. The findings and conclusions of law are as follows:

First – That on the first day of April, 1867, Oliver Baker, father of the plaintiff and defendant, purchased one of Jacob Young, the one hundred and twenty acres of land described in plaintiff's petition, and also a certain twenty acre tract, designated on the plat hereinafter mentioned as the M. Strang tract; that at the time of said purchase, said Oliver Baker, owned and was in possesson of a tract of land containing about one hundred and nineteen acres, lying immediately west of said one hundred and twenty acre tract, and also owned a tract of land containing about two hundred and ten acres, lying immediately north of said one hundred and nineteen acre tract; that at the time said Oliver Baker purchased said one hundred and twenty acre tract from said Young, he, said Oliver Baker, resided and continued to reside on the said two hundred and ten acre tract until the eighth day of September, 1888, hereinafter mentioned.

The following is a plat showing the relative locations of the three several tracts. The one hundred and twenty acre tract or plaintiff's tract, is shown on the plat by the letter "A." The one hundred and nineteen acre or defendant's tract, is shown on the plat by the letter "B." The two hundred and ten acre tract, by the letter "C."

Second – That immediately after said Oliver Baker purchased said one hundred and twenty acre tract and the said twenty acre tract from said Young, to-wit: During said year of 1867, he, said Oliver Baker, made and constructed a private road or way from where he resided in said two hundred and ten acre tract, in an easterly and south-easterly direction over a portion of said last



named tract, and over the said one hundred and nineteen acre tract to the west line of the said one hundred and twenty acre tract; that said way was enclosed with a gate on the west side of said one hundred and nineteen acre tract; that shortly thereafter and prior to the said 8th day of September, 1888, said Oliver Baker, extended said private way westward to a public highway, known as the Oliver Baker road, which runs in a northerly and southerly direction through said two hundred and ten acre tract, a short distance west of said Oliver Baker's dwelling; that said private way from the time so constructed, and up to the said 8th day of September, 1888, was used by Oliver Baker in passing to and from said

one hundred and twenty acre tract, by foot or team, and generally in all such manner as ways are used, and that said way is plainly obvious and apparent, and is reasonably necessary for the use and enjoyment of plaintiff's lands and adds materially to the value thereof.

Third – That at the time said Oliver Baker purchased said one hundred and twenty acre tract and the said twenty acre tract from said Young, he, said Young, used as a means of egress and ingress from and to said one hundred and twenty acre tract, a certain lane known as the "Strang Lane," which leads from the south-east corner of said one hundred and twenty acre tract, eastward, to a public highway known as the "Snyder Road," and that said lane was the only means of outlet said Young had to a public highway from said one hundred and twenty acre tract; that from the time said Oliver Baker purchased said tract from said Young and up to the time he conveyed the same to the plaintiff as hereinafter mentioned, to-wit: Up to the eighth day of September, 1888, the said "Strang Lane," was available to said Oliver Baker, and he did use the same as an outlet to the said public highway from said one hundred and twenty acre tract, without objection from the owner of the soil over which the said lane passed; and that plaintiff from the time said tract was so conveyed to her as aforesaid, has had, and still has the use of said "Strang Lane" as a means of an outlet to the said public highway, if she chooses to so use the same, without objection from the owner of the soil over which said lane passes, and that said lane is reasonably convenient for travel whether by foot or team, and generally in such manner as ways are used.

Fourth – That on or about the first day of September, 1888, said Oliver Baker had three children, to-wit: The plaintiff, defendant and Nancy Baker, for whom he desired to make provision by conveying said

two hundred and ten acre tract, the one hundred and nineteen acre tract, the one hundred and twenty acre tract and the twenty acre tract; that on the first day of September, 1888, the said three children met at the house of the said Oliver Baker, and it was then agreed that said Oliver Baker should convey his homestead, the said two hundred and ten acre tract, to the defendant, Phillip Baker, and that said Phillip Baker should convey back to said Oliver Baker a life estate in the same; that said Oliver Baker should convey to said Nancy Baker, the said one hundred and nineteen acre tract, and also convey the one hundred and twenty acre tract and said other twenty acre tract to plaintiff; and that said Nancy Baker should convey to the said Phillip Baker, the said one hundred and nineteen acre tract, for the sum of $3,000, to be paid by said Phillip Baker to her; that pursuant to the agreement, thereafter to-wit: On the eighth day of September, 1888, the said Oliver Baker executed his deed for said two hundred and ten acre tract to the defendant, Phillip Baker, with general convenants and warranty and against encumbrances, and he, said Phillip Baker, executed his deed to said Oliver Baker for a life estate in said last named tract; that at the same time said Oliver Baker executed his general warranty deed with covenants against encumbrances to the said Nancy Baker for the said one hundred and nineteen acre tract, and at the same time she, said Nancy Baker executed her deed with convenants of general warranty and against encumbrances to the said Phillip Baker for said tract; and he thereupon executed a mortgage deed back to said Nancy Baker, upon said premises, to secure the payment of the said sum of $3,000; that the said Oliver Baker, also executed his deed for said one hundred and twenty acre tract and the said twenty acre tract to the plaintiff, Druzilla Rice.

No mention was made in any of the deeds of the way in controversy; but the granting clause of Oliver

Baker's deed to plaintiff contains, after the description, the usual words, "with all the privileges and appurtenances thereto belonging;" that all the parties had full knowledge of the construction and use of said way by said Oliver Baker.

Fifth – That the defendant, to-wit: On the 22nd day of August, 1894, obstructed said way in controversy by locking and securely fastening a gate which stands across said way, at the west side of said one hundred and nineteen acre tract as aforesaid, and that defendant still continues said obstruction.

As its conclusions of law the court finds as follows:

1st. That the way in controversy is not a way of necessity.

2d. That said way is and was at the time of the execution of the deed to plaintiff by Oliver Baker of a continuous character and an appurtenant belonging to the lands of plaintiff; and as such passed by the general words of said deed granting all privileges and appurtenances thereto belonging; and that plaintiff is, by virtue of said deed, the owner of said right-of-way, and is entitled to the use of the same.

3d. That said Nancy Baker took said one hundred nineteen acre tract subject to plaintiff's right of way over the same.

4th. And for a like reason said Phillip Baker took said two hundred and ten acre tract subject to the right of the plaintiff to said way over the same; and for like reason, said Phillip Baker, took said one hundred and nineteen acre tract, subject to plaintiff's said right-of-way over the same.

5th That defendant's obstruction is wrongful and unlawful.

ERROR is prosecuted here to reverse the judgment on the ground that the court erred in its conclusions of law.

C.E. Critchfield and *Critchfield & Graham,* for plaintiff in error.

Strictly speaking, a way, even of necessity, does not pass as an appurtenance to the dominant estate. It is in such cases, an implied grant of the *right* of the grantee to pass over the land of the grantor and not a grant of any *particular* way, and this right ceases as soon as the necessity ceases. *Nichols v. Luce,* 24 Pick, 102; *Ins. Co. v. Wilison,* 1 Barb. Ch., 353; *Bass v. Edwards,* 126 Mass., 445.

A man can not have an easement in his own lands. There must be two estates, in regard to which it is predicated, and if the same persons own both, the easement is extinguished. Wash. on Real Prop., Fifth Ed., vol. 2, p. 314.

There are, however, what are called *quasi* easements, "as when the owner of land has constructed a way or drain over a portion of it for the benefit of another portion and there has never been a separate ownership of a dominant and servient estate." *Parsons v. Johnson,*68 N.Y.,66; Galeon Easements, 4th ed., 22; Washburn on Easements, 4th ed., 166; *Fetters v. Humphreys,* 19 N.J. Eq., 471; *Fritz v. Tompkins,* Supreme Court of New York at Special Term, November 24, 1896, and reported in the New York Supplement of the National Reporter System, page 985; Francis Appeal, 96 Pa. St., 207; *Pearson v. Spencer;* 1st. B. & S., 582.

A way of necessity is held to pass by implication, for the reason that the parties are presumed to have intended that the grantee should have possession and use of the thing conveyed so far as necessary to the enjoyment of what was conveyed, although not expressly named in the deed. Goddard on Easements, Fourth Ed., 317.

Does a like presumption arise in respect to a way not of necessity, if forsooth it has long been used, is ob-

vious and apparent and convenient as a means of access to the premises granted? *Pyer v. Harter,* 1 Hurl.& N.,916; *Lampham v. Miller,* 21 N.Y., 505.

While the decision as applied to the facts in *Pyer v. Harter,* has been approved by some courts, the general rule there laid down, is denied both in England and in this county. It was expressly overruled in *White v. Bass,* 7 Hurlst & N., 722; and denied in *Suffield v. Brown,* 4 De., G. J. & S., 185. And this is now the settled law in England. *Crossly v. Lightelowler,* L.R. 2 Ch., 478; *Pearson v. Spencer* 3 Best. & S., 761; *Warren v. Blake,* 54 Me., 287; *Buss v. Dyer,* 125 Mass., 291; *Adams v. Marshall,* 138 Mass., 228.

The general rule announced in the case of *Lamphan v. Milks* (21 N.Y., 505), was limited to the cases of continuous easement and such non-continuous easements as are strictly necessary. *Dodd v. Burchill,* 1 H. & C., 113; *Bolton v. Bolton,* 11 Ch. Div., 96; *Walley v. Thompson,* 1 Bos. & P., 371; *Barlow v. Rhodes,* Crompt. & M., 447; *Worthington v. Gimpson,* 29 C.J.Q., 116; *Sheysey v. Nicery,* 16 M. & W., 484; *Thompson v. Waterlow,* Law. Rep., 6 Eq. Cas. 36, and *Langley v. Hammon,* Law Rep., 3 Exch., 161.

The American cases are quite as uniform and pronounced against the doctrine of implied grants of ways, other than ways of necessity, Washburn in his work on Real Property, vol. 2, 319, *Nichols v. Luce,* 24 Pick., 102; *Carbrey v. Willis,* 7 Allen 370; *Ins. Co. v. Milnor,* 1 Barb. Ch., 353.

In the present case the court found as conclusions of law that the defendant in error is, by virtue of the deed of Oliver Baker, the *owner* of the way in controversy. *Huttemeier v. Albro,* 18 N.Y., 49; *Schrymer v. Phelps,* 62 How. Pr., 1; *Serene v. Gregory,* 8 Rich., 158; *Trumbull v. Rivers,* 3 McCord, 131; *Warren v. Blake* 54, Me., 276; *Woosen v. Dantel,* 116 Mo., 379; *Field v. Mark,* 125 Mo., 502; *Wentworth v. Phillpot,* 60 N.H.,

193; 69 Me., 323; *Dolliff v. N.N. Co.*, 68 Me., 173; *Kingsley v. Gouldborough*, 86 Me., 279; *Burns v. Gallagher*, 62 Md., 462.

The only case in Ohio directly bearing upon the questions is *Bailey v. Copeland*, Wright's Rep. 150. It was there held that in prescribing for a way of necessity, the case must show that the *necessity* for it exists; that such way does not result from necessity when the grantee has means of access to the premises granted other than by the way claimed.

Critchfield & Devin, for defendant in error.

Perhaps no subject known to the law has been productive of so much litigation and so many conflicting decisions both in the United States and England as that of easements, but the claims of defendant in error clearly seems to be sustained by the great weight of both American and English authorities. *Morgan v. Mason*, 20 Ohio, 401; *Hazzard v. Robinson*, 3 Mason, 279; *Elliott v. Sallee*, 14 Ohio St., 10; *Meek v. Breckenridge*, 29 Ohio St., 642; *Shields v. Titus*, 46 Ohio St., 528; *National Exchange Bank v. Cunningham*, 46 Ohio St., 575.

In none of the foregoing cases do the court limit the application of the doctrine to "continuous" easements as defined by counsel for plaintiff in error, or in the cases by them cited in support of their claims. In all of those cases continuous easements are said to be those which exist independently of any act of man, such as flowing water, the right to light, air, etc.; while those same authorities class all easements the enjoyment of which necessitates the act of man, as "non-continuous."

In view of the foregoing from our own state it seems unnecessary to multiply authorities, but the following also bear so directly upon the question that we feel justified in bringing them to the intention of the court. *John Hancock, Mutual Life Ins. Co. v. Patter-*

son, 103 Ind., 582; *Morrison v. King,* 62 Ill., 31; *Cihak v. Klekr,* 117 Ill., 643; *Kieffer v. Imhoff,* 26 Penn. St., 438; *Phillips v. Phillips,* 48 Penn. St., 178; *Penn. R.R. Co. v. Jones,* 50 Penn. St., 417; *McCarthy v. Kitchenman,* 47 Penn. St., 239; *Cannon v. Boyd,* 73 Penn. St., 179; *United States v. Appelton et al.,* 1 Sumner, 492; *Jones v. Jenkins,* 34 Md., 1; *Payne v. Chandler, 134 N.Y., 385; Leonard v. Leonard,* 7 Allen, 277; *Donkles v. Wilton Ry. Co.,* 24 N.H., 481; Tiedman on Real Property, section 842; Boone's Real Property, section 140 *et seq.;* Washburn's Real Property, 5 Ed. vol. 2, sections 10, 16; Washburn's Real Property, 4 Ed. top pages 64 and 65, 70 and 71, 692, 297 and 698; *Bowland v. St. John's Schools,* 163 Mass., 236; *Cave v. Crofts,* 53 Cal., 135; Washburn's Real Property, page 317, section 9, vol. 2. Washburn on Easements, 4th Ed., t. p. 692; Ballard's Ohio Real Property, section 356; Boone's Real Property, section 136 and 306, and many cases there cited. See also Washburn's Real Property, 5th Ed., vol. 3, page 419; Washburn's Easements, 4th Ed., t. p. 697.

The cases most relied upon by counsel for plaintiff in error are those in which it was sought by the grantor to reserve an easement in his favor by implication. Comparatively few of these cases go to the point of holding that an easement for the benefit of the granted premises cannot be the subject of an implied grant. Most of that class of cases cited by opposite counsel make a distinction between an implied grant for the benefit of the grantee and an implied reservation imposing a servitude upon the granted premises in favor of the grantor. Washburn on Easements, 4th Ed., page 110; *Payne v. Chandler,* 134 N.Y., 385.

MINSHALL, J. Did the court err in its conclusion of law that the way over the defendant's land passed as an incident to the lands of the plaintiff by the deed of her father? We think it did not.

It is true that at the same time the father conveyed to the plaintiff, he, through his daughter Nancy, conveyed to the defendant the land now owned by him; and if we were to consider this conveyance alone, the way in question would appear as a reservation by the father of a way over the granted lands in opposition to the covenants of his deed. Whether such a reservation could be made by implication in derogation of the grant and the covenants of the deed not be considered in this case. Both the plaintiff and the defendants must, from the facts found, be regarded as grantees of the father by deeds taking effect at one and the same time. And, therefore, neither has as against the other any superior right by reason of priority of purchase; and both were volunteers. Oliver Baker was the owner of both tracts and of two hundred and ten acres where he resided at the time of the conveyances. All the lands lay in a body, and had been acquired by him at different times during his life. He purchased the lands deeded the plaintiff in 1867; and, in that year, constructed the way in question from the lands then purchased over the one hundred and nineteen acre tract, to his residence on the two hundred and ten acre tract and shortly afterwards to the public highway. And the court finds, that from that time to 1888, when the division was made, Oliver Baker used the way in passing to and from the lands purchased in 1867, for all the purposes ways are generally used, and that the "way is plainly obvious and apparent, and is reasonably necessary for the use and enjoyment of plaintiff's land and adds materially to the value thereof." In 1888, desiring to divide his heritage between his three children, he conveyed the one hundred and twenty acre tract acquired in 1867, to the plaintiff, the one hundred and nineteen acre tract to his son, the defendant, subject to the payment of $3,000 to his daughter, Nancy, and also the home tract of two hundred and ten acres, reserving a life estate therein to

himself. The way in question was then in use over and upon the one hundred and nineteen acre tract given the defendant, and materially added to the value of the land given the plaintiff.

We think the law well settled in this state, whatever the decisions may be in some of the others, and they are far from being in harmony, that where an estate is divided as was this one, each takes his part subject to or benefitted by such burthens as were openly and plainly attached to or imposed on it by the common owner in his use and enjoyment of the land at the time of the severance, and which on a severance would properly be termed easements or servitudes. Ignoring for the time the distinction between "continuing" and "discontinuing" easements, observed in some of the cases, the case of *Elliott v. Sallee* is directly in point. Edward Thompson was the owner of three mills on White Oak creek in Brown county. The lower mill was in part supplied with water by a tunnel constructed across the neck of a bend in the creek, so as to take the water from the creek above the dam of the middle mill, and was thereby, to that extent, servient to the lower mill. By deeds executed at the same time he divided these mills between his three sons, so as to give one of them to each. The plaintiff by purchase became the owner of the middle mill, and brought suit against the defendant, who had purchased the lower mill to recover for the diversion of the water from his mill by the tunnel. The court said: "On this state of facts it seems clear to us on every principle of reason and common sense that he (Edward Thompson) must have intended to grant to his sons respectively, and they must have expected to receive, each his mill with its appurtenances as it actually existed in use at the time of the conveyances — no more and no less; and this obvious intention on the part of the grantor, and reasonable expectation on the part of the grantees, furnish the exact measure of the rights of the grantees *inter*

se, and of all parties holding under them respectively." The court referred to and approved *Morgan v. Mason,* 20 Ohio R., 401. See, also, the case of *Meek v. Breckenridge,* 29 Ohio St., 642, where it is said, "A grant of a thing will include whatever the grantor has power to convey which is reasonably necessary to the thing granted;" or, as said by Justice Story in *Hazard v. Robinson,* 3 Mason, 279, "Whatever is actually enjoyed with the thing granted as a beneficial privilege at the time of the grant passes as parcel of it." See also, the later case of *Shields v. Titus,* 46 Ohio St., 528; and *Bank v. Cunningham,* Id. 575. In the latter case it is said, in the syllabus, "When the owner of an estate makes one part of it visibly dependent for the means of access upon another and creates a way for its benefit over another, and then grants the dependent part, the other part becomes subservient thereto, and the way constitutes an easement appurtenant to the estate granted and passes to the grantee as accessorial to the beneficial use and enjoyment of the granted premises." This case is supported in the latitude of its expression by many cases in other states. *Mutual Life Ins. Co. v. Patterson,* 103 Ind., 582; *Morrison v. King,* 62 Ills., 30; *Cihak v. Klekr,* 117 Ills., 643; *Kieffer v. Imhoff,* 26 Penna. St., 438; *Phillips v. Phillips,* 48 Id., 178; *Railway Co. v. Jones,* 50 Id., 417; *McCarty v. Kitchenman,* 47 Id., 239; *Cannon v. Boyd,* 73 Id., 179; *U.S. v. Appleton,* 1 Sum., 492; *Paine v. Chandler,* 134 N.Y., 385; *Collins v. Prentice,* 15 Conn., 39-43.

But it is claimed that only such easements as are termed "continuous" will pass by implication in a grant, and that such as are termed "discontinuous" will not. This is a distinction of the civil law, and has been incorporated in the law of some of the states, particlarly Maine and Massachusetts. The former are such as operate without the intervention of man, such as drains and sewers; the latter require the intervention of man in

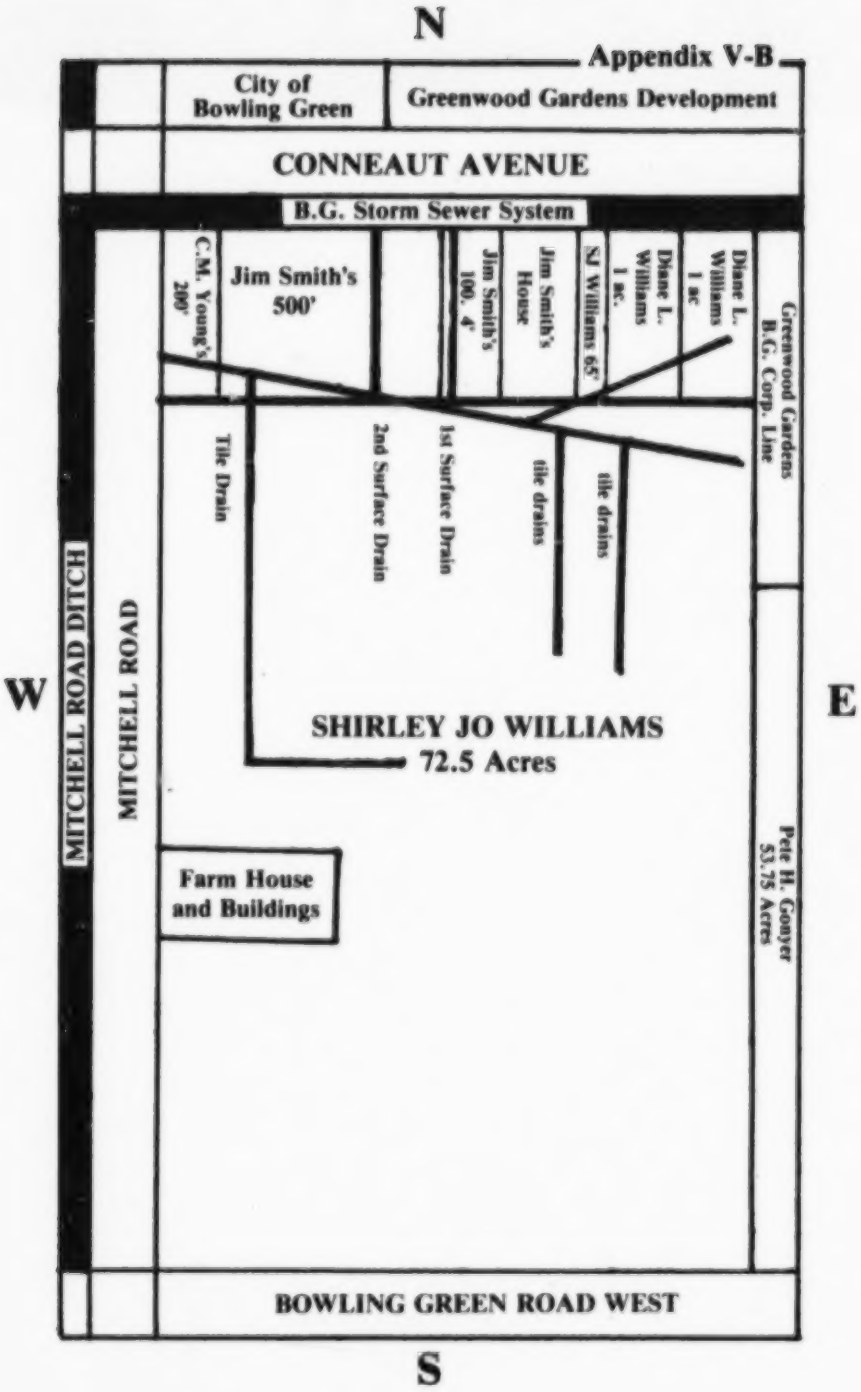
their use, such as ways. The distinction is somewhat arbitrary and is not uniformly adopted, as will appear from the cases cited. The better rule, and the one now more generally adopted, is, not to consider the particular kind of easement, but whether it is apparent, designed to be permanent, and is reasonably necessary to the use of the premises granted. See the cases of *Kieffer v. Imhoff, Phillips v. Phillips, Cannon v. Boyd, U.S. v. Appleton, Puine v. Chandler, Mutual Life Ins. Co. v. Patterson, supra.* In *Phillips v. Phillips,* it is said "It may be granted that the continuance of drains, water pipes and mill-races may more distinctly indicate their permanent and essential nature than a private way: but when the permanency of the way is proved, confessed, or not disputed, the difference vanishes; they stand upon the same footing." In *Paine v. Chandler,* the court, after laying down the general rule, said: "The learned counsel for the appellant does not attack the principle, but his contention is, that the easement involved in this controversy is of the class known as 'discontinuous' and such an easement passes by implication only when absolutely necessary to the enjoyment of the property conveyed. To use his own language, "the rule contended for has been confined to cases where the easement was something without the use of which the premises would be practically worthless.' The rule is not confined in its applications to continuous easements, but applies to those artificial arrangements which openly exist and affect materially the value of the respective parts at the time of the sale."

The case of Francis's Appeal, 96 Penn. St., 200, to which our attention has been called, has been carefully examined, but we do not think that it in any way affects or modifies the previous decisions of that court. From the finding made by the master as to the nature and character of the uses there claimed as easements, on a severance of the properties, he could not well have held

otherwise than he did.

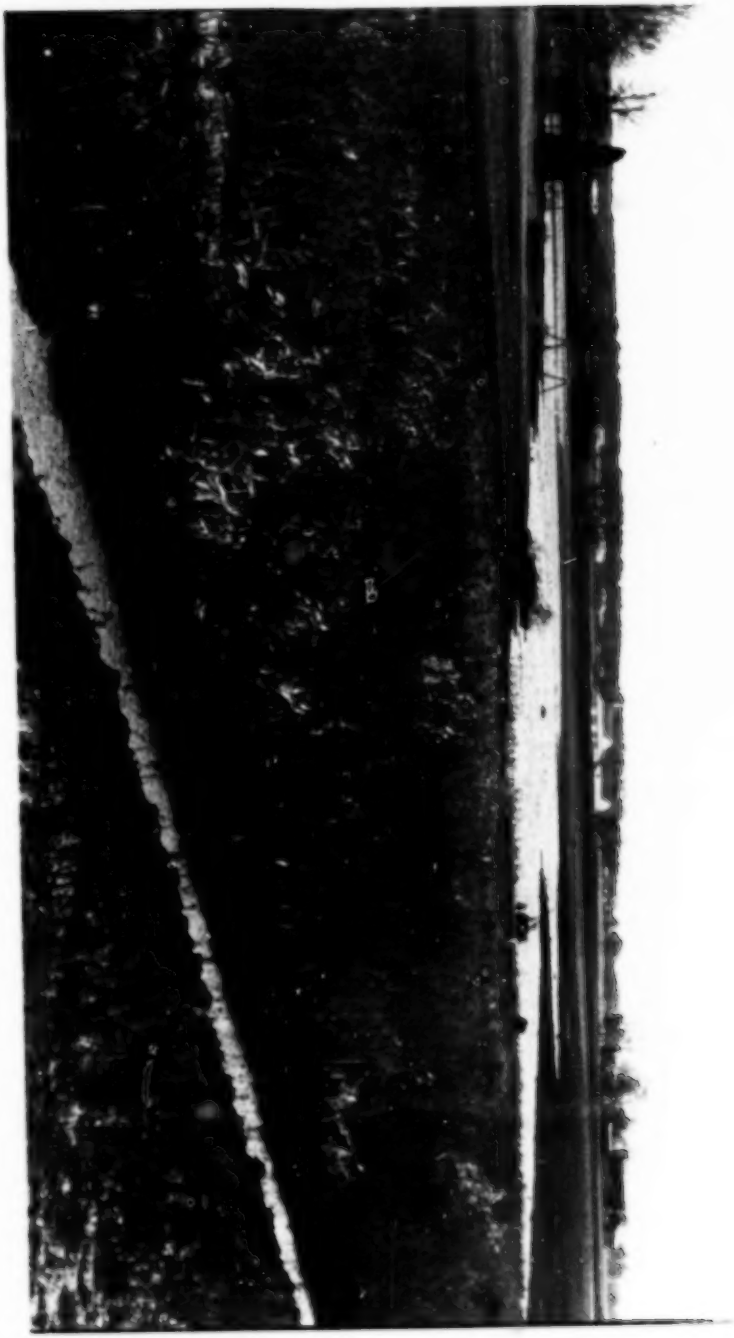
Much importance is attached to the conclusion of law drawn by the court from the finding of facts, that the way in question is not a way of necessity. There is some room for doubt as to whether this conclusion from the facts found, was well drawn. But conceding that it is, still the authorities cited show, that in the case of a grant, this is not material where the way in question is reasonably necessary to the enjoyment of the land granted, and materially adds to its value. *Phillips v. Phillips,* 48 Penn. St., 178.

Judgment affirmed.


N
Appendix V-B
City of Bowling Green
Greenwood Gardens Development
CONNEAUT AVENUE
B.G. Storm Sewer System
C.M. Young's 200'
Jim Smith's 500'
Jim Smith's 100. 4'
Jim Smith's House
SJ Williams 65'
Diane L. Williams 1 ac.
Diane L. Williams 1 ac
Greenwood Gardens B.G. Corp. Line
Tile Drain
2nd Surface Drain
1st Surface Drain
tile drains
tile drains
MITCHELL ROAD DITCH
MITCHELL ROAD
W
E
SHIRLEY JO WILLIAMS
72.5 Acres
Farm House and Buildings
Pete H. Gonyer 53.75 Acres
BOWLING GREEN ROAD WEST
S

Appendix V-C

Defendants' Exhibit F-3



Defendants'
Exhibit G-5

AFFIDAVIT OF SERVICE

I, Shirley Jo Williams, appellant herein, acting pro se, hereby certifies that on April 6, 1982, pursuant to Rule 28(3), Rules of the Supreme Court, I served 3 copies of the foregoing *Supplemental Appendix* on each of the parties herein as follows:

On James L. Smith and Patricia A. (J.) Smith, appellees herein, by depositing such copies in the United States Post Office, Bowling Green, Ohio, with first class postage prepaid, certified mail, return receipt requested, properly addressed to the post office address of Martin L. Smith, the above named appellees' counsel of record at 920½ North Main Street, Bowling Green, Ohio 43402.

All parties required to be served have been served.

Dated April 6, 1982.

Shirley Jo Williams

Shirley Jo Williams
15236 Mitchell Road
Bowling Green, Ohio 43402

Sworn to before me and subscribed in my presence this 6th day of April, 1982.

Barbara A. Bockbrader

Notary Public

Notary Public, State of Ohio
BARBARA A. BOCKBRADER
My Commission Expires Nov. 5, 1982